

MILITARY LAW REVIEW

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BOOK REVIEWS

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MILITARY LAW REVIEW

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MILITARY LAW REVIEW

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Major General Charles Lowman Decker

IN MEMORIAM

Charles Lowman Decker
The Judge Advocate General
1961-1963
Commandant, The Judge Advocate General's School
1951-1955

Major General Charles Lowman Decker, former The Judge Advocate General of the Army and Commandant of The Judge Advocate General's School, died on June 8, 1983 of a heart ailment at Georgetown University Hospital. General Decker is survived by his wife, Suzanne, and sister, Nell Marie Moliston.

General Decker was born in Oskaloosa, Kansas on 18 October 1906. He attended the University of Kansas and was commissioned in the Regular Army after completion of studies at the United States Military Academy in 1931. He received his law degree in 1942 from Georgetown University and attained advanced law degrees from St. Edward's University in 1943 and John Marshall Law School in 1964.

General Decker's military background is extensive. He served with the 29th Infantry and the 14th Infantry prior to attending law school. He was a member of the United States Military Academy faculty as an instructor in Law and in English, and served as a judge advocate at all levels of command. During the Second World War, he served as Staff Judge Advocate of the XIII Corps throughout its campaigns in Western Europe. From 1947 to 1951, he served in the Office of The Judge Advocate General, Washington, D.C. With the great increase in judge advocates because of the Korean conflict, General Decker was selected to establish an appropriate instructional institute for training lawyers for service in the Army. His efforts led to the establishment of The Judge Advocate General's School in Charlottesville, Virginia. General Decker served as the School's first Commandant from 1951 to 1955. During his tenure at the School, General Decker established a separate teaching division for administrative and civil law subjects. In his honor, the School, in 1977, established the Charles L. Decker Chair of Administrative and Civil Law.

From 1957 to 1960, General Decker held the position of Assistant Judge Advocate General for Military Justice, supervising the International Affairs Division, Military Affairs Division, and Legal Assistance Division, as well as the Military Justice Division in the Office of The Judge Advocate General. On 1 January 1961, he assumed the office of The Judge Advocate General of the Army and

served in that capacity until he retired in 1963.

As a military attorney, General Decker left his mark on the development, practice, and teaching of military law. He served as chief drafter for both the 1949 and 1951 Manuals for Courts-Martial, editions which revolutionized military legal practice. As Commandant of The Judge Advocate General's School, he was able to bring all phases of military legal practice together by emphasizing the need for understanding of the entire spectrum of military law. The expansion of The Judge Advocate General's School under General Decker's guidance led to its recognition by the American Bar Association. General Decker's tenure as Assistant Judge Advocate General for Military Justice is significant; during that period the administrative discharge rate of the Army decreased substantially and the court-martial rate decreased by over fifty percent. As The Judge Advocate General of the Army, General Decker continued his achievements as a chief proponent of nonjudicial punishment and as the creator of the first independent military judiciary in the United States.

Following his noteworthy military career, General Decker was instrumental in the development of statewide public defender services in thirty-two states. He was a key participant in the drafting and completion of the Model Public Defender Act, and served as Director of the National Defender Project. Aside from his private practice of law, he has served as Chairman of the American Bar Association's Sections of Criminal Law and Legal Education and Admissions to the Bar, as well as an official adviser to the President's Commission on Law Enforcement and the Administration of Justice.

On the occasion of his passing, The Judge Advocate General's School commemorates the singular achievements of this genuine soldier-attorney and dedicates this volume of the *Military Law Review* to him.

**TDS:
The Establishment of the
U.S. Army Trial Defense Service"**

by Lieutenant Colonel John R. Howell**

INTRODUCTION

By the end of World War II, the organization of military trial defense counsel had already become a sensitive problem for the armed forces. For the next thirty years, it continued to be a troublesome issue. During that time, there were persistent allegations that the military's internal procedures for assigning and otherwise supervising defense counsel had seriously weakened the military criminal justice system.

More specifically, certain critics alleged that defense counsel were not adequately protected from improper command pressures, that inexperienced or incompetent officers were routinely assigned as defense counsel, that these officers tended to cooperate unduly with the government, and that prosecutors usually received better command support than did defense counsel. Taken together, it was said, these conditions had undermined the quality of defense services and had contributed to a loss of public confidence in the essential fairness of military justice.

These charges were not taken lightly. Defenders of the military system pointed out repeatedly that the protections provided by

*The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

The author gratefully acknowledges the assistance of Colonel Robert B. Clarke, Chief, U.S. Army Trial Defense Service, 1978-83. This article could not have been written without his encouragement and guidance.

**Judge Advocate General's Corps, United States Army. Deputy Staff Judge Advocate, 7th Infantry Division, Fort Ord, California, 1983 to present. Formerly assigned as Training Officer, U.S. Army Trial Defense Service, 1980-83; Regional Defense Counsel, Region IV, Fort Hood, Texas, 1979-80. Former military judge, 1st Judicial Circuit, U.S. Army Trial Judiciary, Fort Knox, Kentucky, 1974-76. B.A., 1966, Harvard University; J.D., 1968, Vanderbilt University. Graduate of 25th Advanced (Graduate) Course, JAG School, 1977. Member of bars of Mississippi, the U.S. District Court for the Northern District of Mississippi, the U.S. Army Court of Military Review, the U.S. Court of Military Appeals, and the U.S. Supreme Court. Author of *Article 31. UCMJ and Compelled Handwriting and Voice Exemplars*. The Army Lawyer, Nov. 1982, at 1.

TRIAL DEFENSE SERVICE

Article 37 of the Uniform Code of Military Justice¹ and other built-in safeguards effectively shielded defense counsel from improper command influence. Yet the controversy continued. The military services could not shake a growing perception that the allegations were valid.

Army experience with this problem was similar to that of the other services. Prior to 1978, Army defense counsel were assigned to specific field commands where they worked for the commander's legal adviser, the staff judge advocate. Within each command's legal office, the staff judge advocate determined who would be a defense counsel and how long an officer would remain in that job. The staff judge advocate was also a principal rater for each defense counsel. In short, the staff judge advocate, and thus indirectly the commander, played critical roles in administering the defense function within the command. These officers possessed at least a potential means to influence and even control significant decisions of a defense counsel on behalf of a client.

Whatever advantages this command-oriented system gave the Army, it also had several serious drawbacks. It made possible the routine assignment of marginal or inexperienced judge advocates as defense counsel and tended to weaken the professional independence of military defense counsel. The system treated conflicting loyalties and conflicts of interest for both the staff judge advocate and the defense counsel. Finally, it fostered the perception that military defense counsel were not professionally independent, thereby compromising not only their credibility but also that of the military criminal justice system as a whole.

Except in rare instances, Army defense counsel either encountered no actual improper command pressures or otherwise ignored such pressure and zealously represented their clients. Nevertheless, in the 1970s, public confidence in the system continued to decline. For various reasons, the Army even then resisted significant changes in defense counsel organization.

Finally, in 1978, the Army Chief of Staff authorized a limited test of the U.S. Army Trial Defense Service (TDS), a separate defense organization under the direct control and supervision of The Judge Advocate General (TJAG). By the end of 1979, when the test became Army-wide, all full-time trial defense counsel were assigned to TDS.

¹Uniform Code of Military Justice, article 37, 10 U.S.C. §837 (1976)[hereinafter cited as UCMJ].

To manage them, TDS employed a vertical command and management structure that was separate and distinct from that of local commands. Within this framework, trial defense counsel were supervised and rated by other defense counsel rather than by officials of the local command. In November 1980, after a two-year test, TDS was given permanent organizational status.

For some in the Army, especially certain commanders and staff judge advocates, TDS was an unsettling change. But, in an historical sense, its establishment was not an isolated action. It was instead a valid evolutionary step, closely related to other important changes in the military justice system, particularly the trial judiciary. Though the U.S. Army Trial Judiciary was created twenty years before TDS, both were established to protect key participants in the court-martial process and to improve the public "image" of judges and defense counsel. Moreover, their organizational structures were virtually identical.

From its inception, however, the separate defense concept provoked much more controversy and opposition within the Army than did the idea of an independent trial judiciary. Notwithstanding this reaction, TDS was established. The decision to create a separate defense service and to structure it in a certain way can best be understood by placing it in an historical context. This article will therefore trace the events which led to TDS. The story begins in 1946.

AT WAR'S END

By the end of World War II, many individuals and organizations were convinced that the court-martial system was out of balance. Commanders, they believed, had too much power and influence. Not infrequently, they charged, commanders used this power improperly to manipulate the criminal justice process toward a desired result. In the view of these critics, military defense counsel were frequent victims of improper command influence. It was alleged that, in many cases, this type of command misconduct had denied the accused a vigorous and competent defense.

Because of their wartime experiences, most observers readily agreed that military defense counsel needed more protection from commanders. But there was also a general belief that active commander participation in the disciplinary process was necessary and proper. The real difficulty was in deciding how much command control there should be and how to structure the system to prevent command abuse.

VANDERBILT REPORT

In March 1946, Secretary of War Patterson appointed a civilian advisory committee to evaluate the charges made against the Army court-martial system. Its chairman was Arthur T. Vanderbilt, a distinguished jurist and former American Bar Association (ABA) president.² All the committee members were selected by the ABA at Secretary Patterson's request; none were connected with the executive or legislative branches of the federal government.³

In its final report of December 1946, the Vanderbilt Committee reached two basic conclusions. It found first that the court-martial system had a sound theoretical base. On the other hand, its evidence also indicated "a definite pattern of defects in the operation of the. . . system."⁴

There were other more specific findings. Military defense counsel and court members were identified as frequent targets of improper command actions. In many cases, for example, the committee found that the commanding officer had made a deliberate attempt to influence court members' decisions.⁵ In other cases, after an acquittal or a lenient sentence, the commander sometimes chastised the court members with a written reprimand called a "skin letter."⁶ There were other less direct pressures. Not infrequently, the committee found, the "well-known attitude of the commander" weakened the independence and vigor of the defense.⁷ Aside from this, defense counsel also tended to be less qualified than prosecutors and were

²Report of the War Department Advisory Committee on Military Justice (13 December 1946) (2 vols.) (available in U.S. Army Legal Services Agency Library) [hereinafter cited as Vanderbilt Report].

³The War Department requested the ABA to nominate top-ranked civilian lawyers who would examine the system impartially. Royall, *Revision of the Military Justice Process*, 33 Va. L. Rev. 269, 270 (1974).

⁴Vanderbilt Report, *supra* note 2, at 4 (emphasis added). The committee carefully directed its criticism toward the operation of the system, especially at the trial level. At the outset of the report, the committee commented:

Almost without exception our informants said that the Army system of justice in general and as written in the books is a good one; that it is excellent in theory and designed to secure swift and sure justice; and that the innocent are almost never convicted and the guilty seldom acquitted. With these conclusions the Committee agrees.

Id. at 3.

⁵*Id.* at 6-7.

⁶*Id.* at 7. "Skin letters" were still authorized by the Army Manual for Courts-Martial in 1946.

⁷*Id.* at 7.

often ineffective because of incompetence or inexperience.*

One cause of these operational problems was an insufficient number of competent attorney-administrators. But, according to the committee, the major cause was the absence of adequate internal controls within the military to prevent commanders from using their power and influence improperly.⁹ These flaws and others were found to have distorted the criminal justice process, particularly in the disparity and severity of its impact on guilty service members.¹⁰

In the committee's view, a proper balance had to be restored. One way to do this was to limit command control within the system by taking away many of the commander's court-martial functions. With this goal in mind, the committee recommended the creation of a separate judicial organization while the Judge Advocate General's Department (JAG-D).¹¹ Once charges were referred to trial, this organization would administer and control every phase of the court-martial process except prosecution of the case and clemency actions.¹² As a further limitation, the committee recommended that all promotions, efficiency ratings, and specific duty assignments of judge advocates be governed by the JAG-D rather than by local commands.¹³

Not surprisingly, senior civilian and military officials of the War Department bridled at the proposal.¹⁴ After all, the idea of a separate court-martial administrative structure was aimed directly at the heart of the commander-oriented military justice system. Nevertheless, it was apparent that fundamental legislative reform was imminent unless the Army could persuade Congress to accept a compromise.

⁸*Id.*

⁹*Id.* at 4.

¹⁰*Id.* at 3,4.

¹¹*Id.* at 9-10.

¹²*Id.*

¹³*Id.* at 10.

¹⁴Royall, *Revision of the Military Justice Process as proposed by the War Department*, 33 Va. L. Rev. 269,288(1974). In his comments on the Vanderbilt Report, Under Secretary Royall emphasized its positive findings and also made clear that the War Department would take a much more conservative approach toward reform of the court-martial system than that recommended by the Committee. The War Department felt, he explained, that the Committee received an "exaggerated impression of the prevalence or seriousness of pressure exerted on the courts-martial." *Id.* at 276.

THE ELSTON ACT

In 1948, the Army briefly obtained compromise legislation when Congress revised the Articles of War. Although the new law, known as the Elston Act, expanded the role of lawyers in the Army and provided other needed reforms, it included few of the limitations on command control recommended by the Vanderbilt Committee.¹⁵ It also applied only to the Army. For that reason, it failed to satisfy those who were seeking a unified military justice system.

THE MORGAN COMMITTEE AND THE UCMJ

Despite passage of the Elston Act, public pressure continued to grow for creation of a single military justice system applicable to all the services. In August 1948, the new Secretary of Defense, James Forrestal, appointed a blue-ribbon committee headed by Professor Edmund M. Morgan of Harvard Law School to prepare a uniform criminal code for the military.¹⁶ This gave supporters of the Vanderbilt Report a second chance to persuade Congress to mandate a separate court-martial command.

Seizing this opportunity, several civilian legal organizations and veterans groups, including the American Bar Association, began to lobby the Morgan Committee to purge command control from the court-martial process by adopting the Vanderbilt Committee proposals. As justification, their spokesmen often cited the need to protect defense counsel and to insulate the military justice system from even the appearance of impropriety.¹⁷

When the Morgan Committee submitted its draft to Congress in early 1949, however, it was clear these groups had lost again. In the

¹⁵Act of June 24, 1948, Pub. L. No. 80-759. The Elston Act also outlawed "skin letters" by forbidding the censure or reprimand of any member of a court-martial with respect to the findings or sentence and by prohibiting any attempt to coerce or unlawfully influence the action of a court-martial in the performance of its duties. This prohibition was later incorporated into the UCMJ in Article 37.

¹⁶Unlike the Vanderbilt Committee, the membership of the Morgan Committee was made up almost exclusively of high-ranking military and civilian persons in the Department of Defense, including many who were intimately involved with the administration of the military justice system. Professor Morgan was known for his interest in reform of the court-martial system. After World War I, for example, he had actively but unsuccessfully supported the Chamberlain Bill in Congress for reform of the Article of War. At the time of his appointment in 1948 he was a proponent of "judicialization" of the military justice system.

¹⁷See 34 A.B.A.J. 702-03 (1948); Comments on a Uniform Code of Military Justice, prepared by the Committee on a UCMJ (16 Dec. 1948) (available in U.S. Army Legal Services Agency Library).

proposed legislation, the commander retained most of his functions, including the power to assign and control trial judges and defense counsel.¹⁸

CONGRESSIONAL HEARINGS ON THE UCMJ

Within months, Congress began subcommittee hearings on the draft. The legislators heard testimony from a board range of witnesses. In a last-gasp effort, the ABA once again led supporters of the Vanderbilt Committee proposals.¹⁹ It should be noted that the ABA's view did not represent the opposite extreme from those favoring total command control of the court-martial system. That distinction went to those who argued for total civilian control, a position the ABA opposed.²⁰ "Most military witnesses, including Major General Thomas H. Green, TJAG of the Army, testified in support of the Morgan Committee's plan."²¹

In his own testimony, Professor Morgan gave assurances that his committee had carefully considered all viewpoints in resolving the command control dilemma. He emphasized that the committee had tried to strike a "fair balance." The commander-oriented system was retained, he implied, because the court-martial process had to function in a unique military environment. Removal of the commander from the process would be incompatible with its military nature.²²

At the same time, Professor Morgan acknowledged that the military justice system would lose its integrity and credibility if it became nothing more than an instrument of the commander. To prevent this from happening, the committee had created safeguards modeled on those designed to protect the independent civilian trial court. Perhaps the most important of these protections were the provisions for an impartial judge, qualified legal representation, and civilian appellate review. As Professor Morgan further acknowledged, however, the draft made these latter safeguards available

¹⁸Report of the Committee on a UCMJ to the Secretary of Defense (1949) (available in U.S. Army Legal Services Agency Library). There is no indication that the Morgan Committee considered adopting a separate organization for defense counsel.

¹⁹Index and Legislative History: UCMJ (1950) [hereinafter cited as Legislative History]: Senate Hearings at 60-96, 205-19; House Hearings at 633-59, 715-31.

²⁰Senate Hearings at 83.

²¹Senate Hearings at 255-79. General Green had several reservations about specific provisions. Supporters of the Morgan Committee bill generally argued that separation of the court-martial system from the commander would dilute command control unnecessarily and would result in an artificial treatment of cases. They favored less drastic measures to limit command abuse of the judicial process.

²²House Hearings, at 605-06.

only in general court-martial cases.²³

Professor Morgan also saw Article 37 of the UCMJ as an important protection. In draft, it proscribed “unlawfully influencing the action of a court” and specifically prohibited censure, reprimand, or admonition of counsel for either side in a criminal case with respect to the exercise of their legal duties.²⁴ To add teeth to this prohibition, unlawful command influence, as defined by Article 37, was criminally sanctioned through Article 98.²⁵

As adopted in 1950, the new UCMJ reflected Congress’ acceptance of the Morgan Committee’s model. There were no provisions for a separate court-martial command.²⁶ The commander still had the direct and indirect powers of assignment and supervision through which trial judges, court members, and defense counsel could be influenced. The commander also retained the most important pre-trial and post-trial judicial functions. Conversely, the safeguards recommended by the committee were also approved.²⁷ It was expected that they would be an effective counterbalance to the powers of the commander.

For military defense counsel, the post-war reforms were a watershed. Congress and the services not only acknowledged the

²³*Id.*

²⁴*Id.*

²⁵*Id.*

²⁶The House committee’s report explained its rejection of the ABA/Vanderbilt Committee proposal:

We fully agreed that such a provision might be desirable if it were practicable, but we are of the opinion that it is not practicable. We cannot escape the fact that the law which we are now writing will be as applicable and must be as workable in time of war as in time of peace, and, regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations.

Id., House Committee, at 8.

²⁷As finally adopted, Article 37 stated:

No authority convening a general, special, or summary court-martial, nor any other commanding officer shall censure, reprimand, or admonish such court or any member, law officer, or counsel hereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this code shall attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

Act of May 5, 1950, Pub. L. No. 81-506, 64 Stat. 108.

need for more safeguards for defense counsel, but actually provided several protections. Moreover, for the first time, the concept of a separate administrative organization was seriously considered as a means of protecting defense counsel and other participants in the court-martial process. Although the idea was rejected, it was still available as a future option if the UCMJ protections did not work.

FROM KOREA TO VIETNAM EARLY YEARS UNDER THE UCMJ

For several years after the UCMJ took effect, command abuse appeared to decline in the Army justice system. Only a few incidents were reported.²⁸

In 1957, however, the Court of Military Appeals strongly condemned flagrant government misconduct in *United States v. Kennedy*.²⁹ According to the records in *Kennedy*, the general court-martial convening authority, his staff judge advocate, and the law officer (as the military judge was then called) joined forces to coerce a key prosecution witness to testify favorably for the government.³⁰ The court reversed the accused's subsequent conviction on the ground that it had been compelled.³¹

At the Office of The Judge Advocate General (OTJAG), the *Kennedy* case caused great concern. It raised doubts about the effectiveness of the UCMJ in deterring such actions. Article 37 in particular seemed to be little more than a paper tiger. It was also apparent that the assignment of the defense counsel and the law officer to the local command had made the government's ultimate success possible. Both were members of the staff judge advocate's office; the law officer was in fact the chief of the administrative law division.³²

It seemed clear that some corrective action might be needed,

²⁸See, e.g., *United States v. Guest*, 3 U.S.C.M.A. 147, 11 C.M.R. 147 (1953).

²⁹8 U.S.C.M.A. 251, 24 C.M.R. 61 (1957). The decision was issued on 20 September 1957.

³⁰In those days, the law officer was usually assigned to the local command and performed his judicial duties on a part-time basis, as was the case in *Kennedy*.

³¹In his opinion in *Kennedy*, Judge Latimer described the case as one which "must be catalogued with those which are a discredit to military law..." Judge Latimer made special mention of the law officer's explanation that "certain subjective influences were working on him, including an appreciation... that he had a career in the Army [to consider]." The opinion also noted that, while efforts to coerce the witness were underway, the accused's military defense counsel was ordered not to talk to the witness. *Id.* at 263, 24 C.M.R. at 62, 64.

³²See Record of Trial, *United States v. PV1 Joe Kennedy*, U.S. Army (July 1956), Washington National Records Center, Suitland, Maryland.

including organizational changes within the Judge Advocate General's Corps (JAGC). But the Army desired to avoid a legislative solution.

THE SEARLES COMMITTEE

With this aim in mind, the new TJAG, Major General George Hickman began two separate studies. In December **1957**, at General Hickman's request, the Army Chief of Staff authorized testing of the U.S. Army Field Judiciary as a separate activity of the Office of The Judge Advocate General.³³ A short time later, on **20 January 1958**, General Hickman appointed an *ad hoc* committee of senior judge advocates under the chairmanship of Colonel Jasper Searles to consider the establishment of "a separate corps of defense counsel" who would "not be subject to the control of staff judge advocates and convening authorities."³⁴

After surveying "various judge advocates in the field," the Searles Committee informed General Hickman that, in its opinion, there was no justification for a separate defense corps.³⁵ In a final report submitted in May **1958**, the committee concluded that command misconduct toward defense counsel existed only "in some instances"; therefore, it was not a significant problem within the military justice system. Any comparison with the separate judiciary concept was also rejected. In the committee's view, while society had traditionally placed a high social value on a separate and independent judiciary, the same could not be said for "a separate defense corps consisting of lawyers exclusively employed as trial defense counsel."³⁶

³³As part of the justification for a separate trial judiciary, General Hickman informed the Chief of Staff in the decision memorandum requesting approval of a pilot program:

Analysis demonstrates that the present system used in providing Law Officers is inherently defective, since... [i]t creates the appearance of, and the potential for improper influence by convening authorities and their Staff Judge Advocates, which has resulted in publicized direct criticism by the Court of Military Appeals.

U.S. Army Trial Judiciary Historical File, Decision Memorandum, TJAG to Chief of Staff, Army (**21 October 1957**) (available in Office of the Chief, U.S. Army Trial Judiciary).

³⁴U.S. Army Trial Defense Service Historical File [hereinafter TDS Hist. File], JAGO Orders No. **10**, dated **20 January 1958**, cited in Memorandum from Committee on Defense Counsel to TJAG, Subject: Defense Counsel Program (12 May 1958) (available in Office of the Chief, U.S. Army Trial Defense Service).

³⁵TDS Hist. File, Memorandum from Committee on Defense Counsel to TJAG, Subject: Defense Counsel Program (12 May 1958). Of sixty-six judge advocates who responded to the survey, **62%**(forty-one) were opposed unequivocally; **34%**(twenty-three) favored adoption of a separate defense program or a variation thereof.

³⁶*Id.*

Since improper command influence was not considered a problem, the committee reasoned that improvement of professional competence was the only “raison d’etre” for a separate defense corps. But it decided that such a program in the Army would actually have the opposite effect. Ultimately, the report said, an attorney who was subjected to the “physical and mental strain” of being a defense counsel for a “protracted period” of one to three years would likely become “disenchanted”; the counsel’s efficiency would “rapidly deteriorate after the first few months.”³⁷

Numerous other administrative difficulties were also emphasized. Most of these problems can be traced to the committee’s assumption that defense counsel would be itinerant circuit riders rather than permanently assigned to one installation. For example, the report pointed out that an “habitually absent, touring defense counsel” could not nurture good will and respect in the local military committee. Moreover, a separate program would inhibit the development of “well-rounded, versatile officers” for the JAGC. Other problems included the administrative difficulty of rating defense counsel, increased travel expenses, trial delays, and declining morale and marital conflict caused by constant travel.³⁸

As the report acknowledged, the Army would receive a public relations benefit from a separate defense program. But the committee did not think this possibility alone justified a change. Nor did it appear that the public was demanding this particular form of administration. The public would be satisfied, the report said, “so long as the rights of accused persons continue to be protected as they have in the past.”³⁹

Despite opposition from some senior commanders, the Secretary of the Army approved establishment of a separate trial judiciary organization in November 1958.⁴⁰ But TJAG took no further action with respect to defense counsel. Nevertheless, the study he initiated was the Army’s first internal consideration of the removal of defense counsel from normal command channels.

It is interesting to note the contrasting treatment of the judiciary and defense inquiries by TJAG. General Hickman clearly favored a separate judiciary and probably sensed the soft opposition to that

³⁷*Id.*

³⁸*Id.*

³⁹*Id.*

⁴⁰The Chief of Staff gave final approval to the judiciary program on 25 October 1958, effective 1 January 1959.

idea. He therefore confidently recommended a pilot program, with little or no testing of the waters. By contrast, a separate defense program was sure to provoke wide opposition among SJAs and commanders because it would require more people and "spaces," would presumably be more difficult to administer, and would in most commanders' eyes fragment their commands' legal resources. General Hickman took a preliminary step toward defense reorganization, with the probable intention of recommending a formal test if the Searles Committee returned a favorable report. When the committee failed to do so, that ended the matter.

MILITARY JUSTICE ACT OF 1968

Except for two informal studies, the Army did not seriously consider the separate defense concept again until 1973. During these same intervening years, however, the internal and external pressures for change on the military justice system began to mount.

Congress became much more active. As early as 1962, complaints about the court-martial system from service members and their families led to extensive hearings. These hearings were focused primarily on the way the military justice system was being administered. As they progressed, Congress became convinced that new legislation was needed. First, its evidence indicated that the extent of command control, especially in special courts-martial, was too great. Secondly, the safeguards designed to insulate court members, trial judges, and defense counsel from improper command influence, such as Article 37, had "proved not to be sufficient."⁴¹

In 1968, Congress tried to correct these problems by passing the Military Justice Act, its first major amendment of the UCMJ.⁴² The new law clearly indicated Congress' determination to limit command control by further "judicializing" the system. Many procedures previously applicable only in general courts-martial (GCM) were extended to special courts-martial (SPCM). Military trial judges were given more power and were authorized to preside in SPCMs. Service members being tried in SPCMs would now be entitled to be defended by a certified lawyer as counsel. Other provisions were specifically intended to protect trial judges and defense counsel from improper command influence. Each branch of the

⁴¹Ervin, *The Military Justice Act of 1968*, 45 Mil. L. Rev. 77, 94 (1969).

⁴²Act of October 24, 1968, Pub. L. No. 90-632, 82 Stat. 1335. For background, see Ervin, *supra* note 41; Ross, *Background of the Military Justice Act of 1968*, 23 JAG J. 125, 129 (1969).

military was required, for example, to establish a separate trial judiciary outside normal command channels, as the Army had already done by regulation, for its GCM judges.

For trial defense counsel, however, the new protections were much less dramatic. Despite the previous ineffectiveness of Article 37, Congress continued to favor a general proscription against command misconduct toward defense counsel. Rather than mandating an organizational change, Congress instead amended Article 37. The new provision specifically prohibited giving any defense counsel a less favorable efficiency rating because of the zeal with which the counsel had represented an accused in a court-martial.⁴³

While the Military Justice Act did not bring any drastic changes, it did indicate Congress' continuing concern about the effect of command control on the quality of military justice. After 1968, awareness of Congress' willingness to legislate in this area had a significant influence on the military's actions toward its defense counsel.

THE 1970s: A DECADE OF CONFLICT AND CHANGE

Even as the Army prepared to implement the Military Justice Act, its criminal justice system entered a crisis period more serious than any it had encountered since the 1940s. During the late 1960s and early 1970s, courts-martial often became the focal point for problems within the Army caused by racial animosity and disillusionment with the Vietnam war. Other internal stresses resulted from the changes in criminal law procedures which were then having a powerful impact on both the military and civilian criminal justice systems.

There were external pressures as well. Several highly publicized court-martial cases generated criticism from the television and print

⁴³UCMJ, art. 37(b), 10 U.S.C. §837(b) (1976). As amended in 1968, Article 37(b) provided:

In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

media. Even the U.S. Supreme Court expressed distrust of the system. Confidence in the quality of military justice began to decline once again.

ARMY ACTIONS

Against this background, the Army began to consider defense counsel reorganization more actively. Interestingly, it approached the problem from a different direction. By 1969, there was a growing perception among senior Army judge advocates that efforts to insulate trial defense counsel from improper command control might have the undesirable effect of isolating them from needed guidance and supervision. There was also a strong undercurrent of concern that, if trial defense counsel actually became isolated or perceived themselves to be “cut off” within an unresponsive system, they might begin to look outside the system for remedies for their clients.

In response to this potential problem, Major General Kenneth Hodson, The Judge Advocate General of the Army, began searching for ways to use the existing organizational framework within the Office of The Judge Advocate General to make the Army system more responsive to defense counsel needs and thereby to encourage them to work within the system to defend their clients. He concentrated on the Defense Appellate Division (DAD), the office within OTJAG that controls and supervises the activities of all Army appellate defense counsel.

In 1969, as now, DAD's activities were generally supervised by the Assistant Judge Advocate General (AJAG) for Civil Law to whom the Chief, DAD, reported directly. In addition to his or her appellate responsibilities, the Chief, DAD, monitored trial defense counsel in the field and advised The Judge Advocate General, through the AJAG for Civil Law, of any changes that were needed to enhance the professionalism of those counsel.

In January 1969, General Hodson directed Brigadier General Robert M. Williams, the incumbent AJAG for Civil Law, to advise him on the feasibility of using the AJAG-DAD framework to provide trial defense counsel a technical channel for direct communication on defense matters with the Office of The Judge Advocate General. More specifically, he proposed the creation of an “ombudsman” for trial defense counsel which would provide a “safety valve” by giving legal advice and otherwise assisting frustrated counsel to find proper relief for their clients within the Army system.⁴⁴

⁴⁴TDS Hist. File, Memorandum from AJAG/CL to Chief, DAD, Subject: Ombudsman for Defense Counsel (6 Jan. 1969).

General Williams asked Colonel Daniel Ghent, the Chief of DAD, for his views on the idea and suggested that his office and DAD “combine to furnish the described office.” He pointed out to Colonel Ghent that the ombudsman not only would provide a safety valve, but also would encourage a “(group rapport” among defense counsel who would feel that they now had an (“organization of sorts.”⁴⁵ In response, Colonel Ghent acknowledged the need for a safety valve mechanism. However, the ombudsman idea was impractical, he argued, because of DAD’s remoteness from the field, particularly Vietnam. Nor would it work effectively so long as staff judge advocates had the authority to rate or indorse trial defense counsel under the Army’s officer evaluation system. If a defense counsel used the ombudsman channel, he warned, that counsel’s staff judge advocate might consider the act “disloyal” and “punish” the officer with a bad efficiency report, notwithstanding the strengthened language of Article 37. He concluded that any safety valve mechanism would be meaningful only if staff judge advocates no longer had the authority to formally evaluate trial defense counsel, and those counsel had separate organizational support.⁴⁶

As a counter-proposal, Colonel Ghent recommended the creation of a world-wide trial defense organization to control and rate all trial defense counsel. According to his plan, the new organization would be a part of DAD, under the direct supervision of the Chief of DAD. Regional defense counsel would direct field operations and would provide guidance and supervision for individual counsel.⁴⁷

Colonel Ghent quickly found, however, that his idea was one whose time had not yet come. General Williams soon informed him, later in January 1969, that General Hodson had decided not to accept his recommendation for a separate defense organization at that time. On the other hand, he indicated that TJAG would reconsider the concept in the future.⁴⁸

In March 1970, while General Hodson was still TJAG, Colonel Ghent did submit another detailed memorandum to the AJAG for

⁴⁵*Id.*

⁴⁶TDS Hist. File, Memorandum from Chief, DAD to AJAG/CL, Subject: Ombudsman for Defense Counsel (15 Jan. 1969).

⁴⁷*Id.*

⁴⁸TDS Hist. File, Memorandum from AJAG/CL to Chief, DAD, Subject: Ombudsman for Defense Counsel (17 Jan. 1969). General Hodson did approve new training initiatives at The Judge Advocate General’s School and the publication of a DAD newsletter for trial defense counsel. The latter became *The Advocate*, a journal for military defense counsel which is still edited by the Army DAD.

Civil Law outlining a “centralized defense organization.”⁴⁹ As before, nothing came of the matter. In fact, by that time there was a continuing search within OTJAG for alternatives which did not involve creating a vertical command or taking defense spaces from field commands.

From 1970 to 1973, General Hodson and his successor, Major General George S. Prugh, considered several other less ambitious options for organizing trial defense counsel. For example, in 1972, General Prugh requested a plan which would remove defense counsel in *part* from the staff judge advocate and command line. In September of that year, Colonel Alton H. Harvey, Chief of the Military Justice Division at OTJAG, responded with a memorandum describing a separate rating chain. According to this plan, trial defense counsel would remain assigned to local commands under the general supervision of the staff judge advocate. At the same time they would be placed in an external rating chain in which the SJA and the commander would have no responsibilities.⁵⁰

Under the circumstances at that time, it is not surprising that none of these proposals were adopted. Traditionally, the Army has had an aversion to vertical, “stovepipe” organizations like the one recommended by Colonel Ghent. Army commanders generally believe that these organizations not only deprive a command of critical resources but are also unresponsive to command needs. Other objections to a stovepipe unit specifically for defense counsel centered around the need for additional funding and at least ten new field-grade spaces for the regional supervisory counsel.

Additionally, the hybrid rating scheme suggested by Colonel Harvey was highly objectionable to staff judge advocates. While it removed the trial defense counsel from the staff judge advocate’s control (with respect to defense duties only), the ultimate responsibility for providing defense services was left in the SJA’s hands.

⁴⁹TDS Hist. File, Memorandum from Chief, DAD to AJAG/CL, Subject: A Centralized Defense Organization (3 Mar. 1970). Colonel Ghent proposed a regional defense organization under the control and supervision of the Chief of DAD. Trial defense counsel would be assigned to the Defense Appellate Division and be supervised by a regional defense counsel who would perform both administrative and defense duties. Defense counsel would be rated only by their superiors in the defense framework. Administrative and logistical support would be provided by local commands, similar to the arrangement for military trial judges. The proposal thus contained several key elements identical to those used when TDS was eventually implemented.

⁵⁰TDS Hist. File, Memorandum from Chief, Military Justice Division, OTJAG, to TJAG, Subject: New Defense Counsel Organization and Rating System (29 Sept. 1972).

Although all of these alternatives were rejected, the effort put into designing and studying them was not wasted. Each new plan further clarified the various options for reorganizing defense counsel. This would prove to be an invaluable aid in future Army planning.

CONGRESSIONAL ACTIONS SENATOR BAYH's COURT-MARTIAL COMMAND

During the 1970s, other external pressures continued to emerge from a familiar source, the U.S. Congress. While the public's eye was turned on the military justice system, some congressmen and senators called for more legislation. They believed the Military Justice Act had not gone far enough and wanted to limit command control even more.

In 1970, Senator Birch Bayh introduced a bill to require each service to create a "court-martial command" under the supervision and control of each service judge advocate general. Senator Bayh's proposal was similar in concept and design to that made by the Vanderbilt Committee and the ABA in 1946. Its purpose was to take away the commander's judicial responsibilities once he had preferred charges.⁵¹

Senator Bayh introduced his bill three times between 1970 and 1973, but it never got out of committee. Congress' refusal to go along with him and others who submitted similar plans throughout the 1970s was due in part to vigorous opposition from the Department of Defense. In another sense, however, it showed that, despite public criticism, Congress wanted to give the Military Justice Act a chance to work before making more changes.

⁵¹An excellent discussion and refutation of Senator Bayh's bill and other Congressional proposals can be found in an article authored by General Kenneth Hodson after his retirement as TJAG of the Army. See Hodson, *Military Justice: Abolish or Change?*, 22 Kan. L. Rev. 31 (1973). General Hodson nevertheless favored legislation to make defense counsel "as independent of command as possible under the circumstances." For practical reasons, principally personnel shortages, he did not call for a statutorily-mandated defense organization. He did state that providing defense counsel from the SJA's office "appears to violate the spirit, if not the letter, of section 1.4 of the ABA Standards for Providing Defense Services..." *Id.* at 47, 49, 53.

DOD ACTIONS TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE

Senator Bayh's bill and the various proposals studied by the Army all came to naught. But there were other actions at the Department of Defense level which had a decisive effect on later events affecting defense counsel. By early 1972, racial discrimination within the military justice system was perceived to be a major problem. In April 1972, Secretary of Defense Melvin R. Laird appointed a task force on the administration of military justice to study the effects of racism within the armed forces.⁵² Its primary mission was "to identify and assess the impact of racially related patterns or practices on the administration of justice" to "to make recommendations to strengthen the military justice system and to enhance the opportunity for equal justice for [all]."⁵³

In November 1972, after eight months of study, the task force submitted an extensive report. One critical finding was that actual command misconduct toward defense counsel was not widespread. Instead, the more serious problem for military defense counsel was one of perception.⁵⁴

According to the report, even when command misconduct did occur, defense counsel generally could be expected to resist and continue to represent their clients effectively.⁵⁵ Nevertheless, among service members, defense counsel were perceived differently. They were seen by many as creatures of the command, given to undue cooperation with the government, or unduly vulnerable to command pressures:

Many enlisted men [the report said] indicated a lack of confidence in military defense counsel. They believe that defense counsel are not truly representing the interest of the accused, but rather serving the commander. This perception was present even though, in the vast majority of

⁵²Nathaniel R. Jones, General Counsel for the National Association for the Advancement of Colored People, and Lieutenant General C.E. Hutchin, Jr., Commander, First Army, were designated co-chairmen. Membership included prominent civilian lawyers, jurists, officials of civil rights organizations, and The Judge Advocates General of all of the services.

⁵³I Department of Defense, Report of the Task Force on the Administration of Military Justice in the Armed Forces 1-2(1972) [hereinafter cited as 1972 DOD Task Force Report].

⁵⁴*Id.*, Vol. I at 81-82; Vol. II at 59.

⁵⁵*Id.*, Vol. I at 86-87; Vol. II at 67.

cases, the defense counsel was, in fact, defending his client to the utmost of his ability. The Task Force found that there are many dedicated, able and enthusiastic judge advocates serving as defense counsel in the military services today; yet this perception of duplicity exists.⁵⁶

Regardless of the inaccuracy of this perception, the task force clearly believed that the credibility of defense counsel would only decline further if no corrective action was taken. In its recommendations, the task force attacked the problem in two ways. First, it recommended measures to assure that defense counsel were immediately perceived by their clients as separate from the command. This meant adequate legal facilities, including sufficient administrative and logistical support, and a private office for each defense counsel separate from that of the trial counsel.⁵⁷

Secondly, and most important, the task force recommended that defense counsel be reorganized so that they would in fact be separate from the command. All judge advocate defense counsel, said the report, should be placed "under the direction of the appropriate Judge Advocate General." Defense counsel would thus "be removed from control of the commanders they serve, thereby virtually eliminating the possibility of any real command influence."⁵⁸ An arrangement was suggested whereby a circuit defense counsel would supervise and rate the defense counsel within a circuit and, in turn, be supervised and rated by the chief of the defense appellate division in the service judge advocate general's office.⁵⁹

THE AD HOC COMMITTEE ON DEFENSE COUNSEL

After receiving the report in late November 1972, Secretary Laird acted quickly. On 11 January 1973, he directed each of the services "to submit plans to revise the structure of the Judge Advocate organizations to place defense counsel under the authority of the Judge Advocate General..."⁶⁰ General George Prugh immediately appointed an ad hoc committee on defense counsel organization to develop such a plan and to consider the advantages and disadvantages of implementation within the Army. The committee, chaired by Major General Harold E. Parker, the Assistant Judge Advocate

⁵⁶*Id.*, Vol. II at 59.

⁵⁷*Id.*, Vol. I at 123; Vol. II at 59-60, 69.

⁵⁸*Id.*, Vol. I at 87-88, 124-25; Vol. II at 67-68, 70.

⁵⁹*Id.*

⁶⁰TDS Hist. File, Secretary of Defense Memorandum, Subject: Report of the Task Force on the Administration of Military Justice in the Armed Forces, (11 Jan. 1973).

General, met for the first time on 22 January 1973.⁶¹

Whatever option the Parker committee finally selected had to be consistent with Secretary Laird's instructions. Over the next three months, that fundamental assumption influenced several major decisions. As a basic premise, the committee decided that the new organization had to be truly separate for both command and management purposes. In other words, local commands must be divested of all control over full-time defense counsel.⁶²

On this point, several concepts were rejected because they either did not comport with the Secretary's directive or carried the proposed changes further than was necessary. For example, all hybrid arrangements, such as a separate rating scheme, which envisioned only a partial divestment of command control, were considered unacceptable to Secretary Laird and impracticable as well. Likewise, concepts based on civilianization of all trial defense spaces or organization of both prosecutors and defense counsel into a court-martial command under the TJAG, similar to Senator Bayh's proposal, were rejected because they went too far.⁶³

Equally important was the related decision made by the committee to keep the defense chain distinctly separate even within the JAGC up to the departmental level. This meant that command responsibility over prosecutors and defense counsel would never reside in the same commander. Nor would the respective lines of supervisory responsibility merge until they reached the highest levels of the JAGC. Defense counsel would thus be effectively insulated against improper influences through either the local command or their own supervisory chain.⁶⁴

A third related decision involved the type of organizational structure to be employed. Eventually, the committee narrowed its consideration to two concepts. One called for a vertical or "stovepipe" organization which would be staffed primarily on the basis of a single, unified table of distribution and allowances (TDA). A second

⁶¹TDS Hist. File, Memorandum for Ad Hoc Committee on Defense Counsel Organization, Subject: Minutes of Meeting on 22 January 1973 (31 Jan. 1973). Other committee members were Colonel Alton Harvey, Chief, Military Justice Division, OTJAG, Lieutenant Colonel Ronald M. Holdaway, Chief, Government Appellate Division, and Major William K. Suter, Personnel, Plans and Training Office, OTJAG.

⁶²TDS Hist. File, Decision Memorandum, DAJA-MJ 1973/11806, Plan for Defense Counsel Organization Under the Authority of The Judge Advocate General (15 May 1973). The decision memorandum stated strongly that "any association of command channels under which the defense counsel functions in a chain with the convening authority will fall short of the mission directive."

⁶³*Id.*

⁶⁴*Id.*

concept was based on the placement at various field locations of "modular" defense teams organized and staffed according to a table of organization and equipment (TOE).⁶⁵

The TOE option was finally dropped, primarily because of opposition within OTJAG and the Office of the Assistant Chief of Staff for Force Development.⁶⁶ Several good reasons prompted this opposition. For example, the TDA structure could be established quickly. It would provide clear command and management relationships and would thus be more responsive. A unified TDA at the Department of the Army level would provide maximum flexibility for shifting personnel to meet fluctuating caseloads and mobilization and deployment requirements. Finally, a stovepipe organization would be more visible to service members and the public; it would be an effective counter to the negative perceptions of defense counsel discovered by the DOD task force.⁶⁷ Taken together, these advantages added up to a tight, yet flexible, organization.

On the basis of these decisions, the committee designed an ambitious but costly separate defense structure. According to its plan, the Trial Defense Division, as it was called, would be part of the U.S. Army Legal Services Agency (USALSA).⁶⁸

In 1973, USALSA had been established for several years as a field operating agency of the OTJAG. It already provided command control and supervision and other administrative support for certain diverse elements of the OTJAG, including the Trial Judiciary and the Defense Appellate Division. USALSA was a logical choice to provide the same type of support for a separate trial defense activity.

Within USALSA, the committee grouped the DAD and the new defense unit into a Directorate of Defense Services headed by a Brigadier General. Under the USALSA umbrella, the Trial Defense Division would operate in the field through a vertical structure consisting of an Office of the Chief at the top, six regional offices, and area defense offices located at major installations.⁶⁹

Personnel spaces would be established by a unified TDA carried on the USALSA TDA. In addition to 292 officer spaces, 163 enlisted or civilian support personnel were included. An alternative manning plan provided an additional 114 enlisted paralegal assistants.⁷⁰ Coming at a time when the JAGC was short of manpower, however, these

⁶⁵TDS Hist. File, Memorandum from Chief, Military Justice Division, OTJAG, to Acting TJAG, Subject: Defense Counsel Organization (30 Mar. 1973).

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹TDS Hist. File, Decision Memorandum (15 May 1973), *supra* note 62.

⁷⁰*Id.*

requirements could not possibly be provided from existing resources.

Grade authorizations were, for that time, equally ambitious. For its chief, the new activity was authorized a colonel. Each regional office was authorized a lieutenant colonel to serve as senior defense counsel. For area offices, the chief defense counsel was to be a major.⁷¹

A big price tag came with this plan. Total cost per fiscal year to operate the organization with paralegal assistants was estimated at \$1,900,000. The cost without paralegals was \$1,700,000 per fiscal year. Both these projections were ballooned by the inclusion of the annual salaries of thirty-two additional lawyers at \$15,000 per attorney, which the plan required and their training costs at the judge advocate basic course at \$5,500 per attorney. Also included were the annual salaries of eighty-eight GS-5 administrative personnel at \$8,200 per secretary. All these latter costs comprised approximately \$1,400,000 of the final total of \$1,700,000 required to run the organization without paralegals.⁷²

Interesting, the *ad hoc* committee never developed a more modest, less costly version. Instead, the planners came up with an expensive model and stuck with it despite the prohibitive personnel and funding requirements. This position perhaps reflected the strong opposition among senior judge advocates to the establishment of a separate defense service at that time. Most senior judge advocates believed, as did TJAG, that there was no real lack of independence for Army defense counsel.⁷³ In their view, creation of a separate defense service would cause serious problems for both staff judge advocates and defense counsel in accomplishing the defense mission.

On 15 May 1973, TJAG forwarded the plan to Secretary of the Army Howard Callaway. However, General Prugh recommended against implementation because of the shortage of military lawyers, particularly in the supervisory grades. Instead, he urged approval of an alternative directive to major commanders that defense counsel offices be made “visibly separate” from those of staff judge advocate and prosecutors. These recommendations were approved by Secretary Callaway. Although the Secretary of Defense did not formally participate in this decision, his office reviewed Secretary Callaway’s action and gave it tacit approval.⁷⁴

⁷¹*Id.*

⁷²*Id.*

⁷³TDS Hist. File, Letter from TJAG to all SJA’s, Subject: Providing Adequate Defense Services—The Defense Counsel, DAJA-MJ 1973/12018 (24 Aug. 1973).

⁷⁴TDS Hist. File, Decision Memorandum (15 May 1973), *supra* note 62.

By contrast, the Air Force and the Navy established separate trial defense organizations. Their new programs became operational in July 1974.⁷⁵ Serious efforts by the Army to establish a defense organization did not take place again until 1977. Nevertheless, the positive actions taken by the other services, together with the interest shown by Congress, the Court of Military Appeals, and the DOD, put continuing pressure on the Army to follow the Navy and the Air Force.

VISIBLY SEPARATE

Though the Army had won a deferral of its separate defense program, the image problem afflicting its defense counsel still remained. Negative perceptions of Army defense counsel among soldiers and civilians were likely to persist. In August 1973, General Prugh acknowledged this probability in a letter to Army staff judge advocates: "It may be self-consoling to believe our hearts are pure, but unless this is evident to the critic and the skeptic, we must expect reform proposals." For this reason, he intimated, the Army ultimately might have to establish a defense organization.⁷⁶

Meanwhile, Secretary Laird's and Secretary Callaway's acceptance of TJAG's alternative proposal committed the Army to make some immediate improvements for defense counsel which would not require additional personnel. General Prugh took action in two key areas. First, in June 1973 and again in 1974, acting on his recommendation, the Army Chief of Staff directed all general court-martial convening authorities to provide each defense counsel with a private office which was visibly separate from those of government counsel. Other support services for defense counsel also had to be improved.⁷⁷

⁷⁵The article by General Hodson, *supra* note 51, at 48-49, describes the Navy and Air Force organizations. The Navy assigned both trial and defense counsel to a Navy Legal Services Office (NLSO) within the Navy JAGC under the command of a Navy legal officer. As General Hodson correctly noted, the Navy organization, which is still in operation, somewhat approximates Senator Bayh's idea for a "court-martial command." As a result of a recent informal opinion by the American Bar Association, however, the Navy is now testing a new separate organization to which defense counsel only are assigned. The Air Force established an area defense organization similar to that suggested in the 1972 DOD Task Force Report.

⁷⁶TDS Hist. File, Letter from TJAG to all SJAs (24 Aug. 1973), *supra* note 73.

⁷⁷TDS Hist. File, HQDA Directive, Subject: Support for Military Legal Counsel (15 June 1973). The directive, issued by order of the Secretary of the Army, instructed GCM convening authorities to insure that:

- a. Defense and trial counsel in their jurisdictions have adequate office facilities, including private offices, and necessary logistical and administrative support, including transportation;
- b. Offices of Defense counsel are visibly separate from those of staff judge advocates and trial counsel.

Secondly, in August **1973**, General Prugh urged staff judge advocates, especially those in charge of the larger Army legal offices, to make certain changes in their offices to upgrade the quality of defense counsel. He suggested an appropriate period of on-the-job training before assigning a new judge advocate as a defense counsel and a fixed rotation of counsel.⁷⁸

General Prugh also directed the creation of an informal defense structure. Under this system, each local staff judge advocate would designate a senior defense counsel to supervise and rate the other defense counsel in the office. At the major command (MACOM) level, each MACOM SJA would appoint a senior defense counsel who would function primarily in a general advisory capacity for defense counsel throughout the command. This informal defense chain was to flow upward through the local and MACOM senior defense counsel throughout the command. This informal defense chain was to flow upward through the local and MIA COM senior defense counsel to the Chief, DAD, and finally to the AJAG for Civil Law.⁷⁹ In two subsequent followup letters in **1974** and **1975**, General Prugh and Brigadier General Bruce Coggins, the AJAG for Civil Law, emphasized the importance of the informal defense structure and urged defense counsel to use it to obtain information, advice, and guidance.⁸⁰

These improvements were intended to equalize trial and defense counsel in terms of experience and support and to enhance perceptions of the trial defense counsel as competent and independent professionals. The measures no doubt had a beneficial effect. Considering the limited resources available to the Judge Advocate General's Corps from **1973** to **1976** and the opposition of many staff judge advocates to any separate defense organization, these efforts were probably the most that could be accomplished. Nevertheless, they affected no fundamental changes.

This policy letter was expanded and renewed in **1974** for another year, to expire on **31 October 1975**. The expanded version was softened to the extent that it "requested" the facilities to be provided. After **1975**, it was not renewed. *See* TDS Hist. File, HQDA Directive, Subject: Support for Military Legal Counsel (**31 Oct. 1974**).

⁷⁸TDS Hist. File, Letter from TJAG to all SJAs (**24 Aug. 1973**), *supra* note **73**.

⁷⁹*Id.*

⁸⁰TDS Hist. File, Letter from TJAG to all SJA's, Subject: Senior Defense Counsel, DAJA-MJ **1974/11309** (**31 May 1974**). In his letter, General Prugh specifically described his views concerning the duties of senior defense counsel. *See also* TDS Hist. File, Letter from AJAG/CL (BG Coggins) to all defense counsel (**25 Apr. 1975**). By addressing his letter directly to trial defense counsel, General Coggins emphasized the supervision and other services available to them through the informal chain.

A NEW TJAG: MAJOR GENERAL PERSONS

In July 1975, Major General Wilton B. Persons, Jr. became TJAG. As an experienced administrator of the military criminal justice system, he had a keen interest in improving the quality of trial and defense counsel. He soon confirmed his support for the ongoing programs regarding defense counsel. But he too chose to move cautiously at first by expanding and strengthening the informal defense structure which General Prugh had begun to build.

General Persons' early efforts to benefit defense counsel were not controversial, perhaps because they had no more than an indirect impact on field operations. Soon after assuming office, he directed a series of measures designed to improve the selection, training, and professional development of defense counsel. For example, a new defense advocacy course was established at The Judge Advocate General's School. The OTJAG Professional Ethics Committee was also revitalized and strengthened.

With the assistance of Colonel Alton Harvey, who was then the Chief of DAD, General Persons brought to fruition General Hodson's idea of a defense "ombudsman" by establishing the Field Defense Services Office (FDSO) in the Defense Appellate Division. This office, staffed with four full-time officers, provided informal advice and guidance to trial defense counsel through *The Advocate*, the journal for defense edited by the Defense Appellate Division, field seminars, and answers to telephone inquiries.⁸¹ However, it had no supervisory authority over trial defense counsel. After FDSO became operative on 1 October 1976, it quickly became known among defense counsel as "dial-a-prayer."

General Persons' later actions, however, were more controversial because they were aimed directly at SJA field operations. Previously, in July 1975, he had urged staff judge advocates to assure that new counsel gained experience as prosecutors before undertaking defense duties.⁸² In less than a year, it became apparent that this attempt at persuasion had failed. Studies showed that SJAs had continued to assign a large percentage of their new counsel initially as defense counsel.⁸³

⁸¹TDS Hist. File, Letter from TJAG to all SJAs, Subject: Field Defense Services (7 Sept. 1976), *reprinted in* The Army Lawyer, Oct. 1976, at 1,1-6. The first and only FDSO Division Chief was Major Joe D. Miller.

⁸²TDS Hist. File, Letter from TJAG to all SJAs, Subject: Training and Evaluation of Defense Counsel (23 July 1975).

⁸³TDS Hist. File, Electrical Message, Chief, Criminal Law Division, to all SJAs, Subject: Delayed Certification of Defense Counsel (8 Mar. 1977).

Clearly disappointed at this lack of response, TJAG took strong action. In December 1976, he mandated a system popularly known as “split certification,” which prohibited a basic course graduate from acting as a trial defense counsel until he or she had satisfactorily completed a minimum four months of military justice duties. For this program to work, TJAG had only to withhold certification to act as a defense counsel until the new judge advocate had at least four months experience as a prosecutor.⁸⁴ To the dismay of most staff judge advocates, the new system became effective 1 April 1977.⁸⁵

At this same time in early 1977, General Persons also began to consider actual changes in defense organization. He first turned his attention to the old concept of a separate rating chain for defense counsel.⁸⁶ He proposed that each staff judge advocate would continue to detail defense counsel from among the legal officers assigned to the office, one of whom would be further designated as the senior defense counsel. On the other hand, the SJA would no longer rate defense counsel concerning their performance of defense functions. Instead, they would be evaluated through a separate chain that flowed through the senior defense counsel and a regional defense counsel, both of whom would be assigned to the U.S. Army Legal Services Agency, but with duty station in the field, to the Chief of DAD. This hybrid arrangement gained as little support in 1977 as it had in 1972 and 1973 when first General Prugh and later the Parker committee considered and rejected the idea. Its major weakness was that it violated a fundamental management principle by separating the authority to supervise and control the individual trial defense counsel from the responsibility for the actions of that counsel. As staff judge advocates viewed it, they would be left responsible for a defense counsel's work, but powerless to correct any deficiencies.

Near unanimous rejection of the separate rating chain proposal, described by Colonel Harvey as a “halfway system,” was crucial, because it left General Persons with two basic alternatives: to remain with the status quo, or to establish a separate defense organization. In March 1977, now Brigadier General-designate Harvey, then the AJAG for Civil Law, urged The Judge Advocate General to seize the initiative while the direction and the extent of change in the defense area could still be shaped and controlled from within the Judge

⁸⁴TJAG had this authority under UCMJ, Art 27(b), 10 U.S.C. §827(b)(1976).

⁸⁵TDS Hist. File, Electrical Message (8 Mar. 1977), *supra* note 83.

⁸⁶Consideration of several proposals for a separate rating scheme actually began in late 1976 and continued until March 1977. *See* TDS Hist. File, Memorandum, Acting Chief, DAD, to AJAG/CL, Subject: Separate Rating System for Field Defense Counsel (3 Jan. 1977); Routing Slip comments by AJAG/CL (8 Mar. 1977).

Advocate General's Corps. He recommended that TJAG take action to establish a separate defense organization.⁸⁷

After receiving this advice, TJAG reviewed the personnel picture and concluded that the factors which had precluded the Army from implementing the separate defense concept in 1973 no longer existed. There had been a steady increase of field grade judge advocates to staff middle management positions. Concurrently, court-martial rates had declined substantially. Indeed, the costs of a defense counsel program were no longer prohibitive in terms of either funding or personnel.

General Persons then made this decision quickly. By March 1977, he had directed Colonel Wayne Alley, the Chief of the Criminal Law Division at OTJAG, to assign and take the actions necessary to establish a separate defense organization. With this decision he set in motion a complex, year-long train of planning and decision-making that lasted until early 1978.⁸⁸

A FINAL PLAN FOR TDS

By late 1977, General Persons had approved a detailed plan for a defense organization composed only of full-time defense counsel.⁸⁹ Although similar to the plan submitted to the Secretary of Defense in 1973, it differed in important respects, particularly in its lack of provision for civilian and enlisted support personnel and paralegal assistants.

The key features of the plan were fully developed:

1. *Command control within USALSA.* As in the 1973 plan, the new U.S. Army Trial Defense Service (TDS) was satellited on the U.S. Army Legal Services Agency, which would provide command control and most funding for temporary duty for TDS counsel, and administrative and logistical support for the Office of the Chief of

⁸⁷TDS Hist. File, Routing Slip comments *supra*, note 86.

⁸⁸On 11 April 1977, Major John Carr became a full-time action officer for the purpose of preparing an implementation plan. TDS Hist. File, Memorandum, Chief, Criminal Law Division, OTJAG, to Commander, USALSA, Subject: Establishment of a Separate Trial Defense Organization (13 Apr. 1977). It should be noted that those in Washington who were preparing the TDS proposal were aware as early as June 1977 that the General Accounting Office was studying military defense counsel organization. The GAO was reportedly considering the establishment of a DOD defense corps, among other models. *See* TDS Hist. File, Letter from USAREUR Judge Advocate to all USAREUR SJAs (7 June 1977). When this became known, it must have added a special urgency to Colonel Harvey's advice.

⁸⁹TDS Hist. File, Letter from TJAG to MACOM SJAs, Subject: Establishment of US Army Trial Defense Service (23 Aug. 1977).

TDS. All full-time Army defense counsel would be assigned to USALSA, with duty at TDS offices in the field. Unlike the 1973 plan, there was no provision for a Directorate of Defense Services. TDS would be a separate division within USALSA, distinct from and co-equal to the Defense Appellate Division. Consideration was given to making TDS a separate agency like USALSA or a branch of DAD within USALSA. Because of potential conflicts between appellate and trial defense counsel, the latter idea was rejected.⁹⁰ On the other hand, although the same objection could be made to a lesser extent to making TDS a separate division of USALSA, this objection was overborne by the anticipated difficulty of establishing another field operating agency within OTJAG. Satelliting TDS on USALSA would reduce the administrative "hassle."⁹¹

2. *Operational Control.* To avoid any hint of improper influence on defense counsel, The Judge Advocate General established separate command and operational lines of control for TDS. The Commander of USALSA would have no control over day-to-day defense operations. Instead, the AJAG for Civil Law would exercise general supervisory authority over these operations; he or she would report directly to TJAG on them. Moreover, operational lines of authority over Army prosecutors and defense counsel would not merge until they reached The Judge Advocate General.

3. *Vertical Structure/Separate Rating Chain.* At the bottom of TDS' vertical structure were the field offices, which would function as tenant organizations at local installations. Regional defense offices would also be located at various field installations. At the top was the central control element, a four-officer Office of the Chief. There were also three levels of management and supervision. A senior defense counsel (SDC) would head each field office and would rate all trial defense counsel under his or her supervision. The next level, a field-located regional defense counsel (RDC), would supervise and rate each SDC within a certain geographical area. Completing the defense chain was the Chief of TDS, who would be a colonel.

4. *Personnel.* With the exception of personnel spaces for the Office of the Chief and regional defense counsel, all the trial defense counsel slots would come from the transfer to TDS of existing command

⁹⁰TDS Hist. File, Briefing Paper, Decision Points in Establishing a Separate Defense Organization. The briefing, conducted by Colonel Wayne Alley, Chief, Criminal Law Division, OTJAG, took place on 3 August 1977. The paper contains handwritten notes by General Persons indicating his decisions on key points, including the decision that RDCs would not be assigned individual cases. *See also*, TDS Hist. File, Draft Implementation Plan for the Separate Defense Element (Undated).

⁹¹TDS Hist. File, Briefing Paper, *supra* note 90.

defense spaces. Remaining spaces for the Chief's office and for RDCs would come from the merger of the Field Defense Services Office with TDS and the transfer of vacant USALSA military magistrate spaces to TDS.⁹² A total force of approximately two hundred-fifty defense counsel, including supervisory personnel, was contemplated.⁹³

5. *Administrative and Logistical Support.* No provision was made for enlisted or civilian support personnel or paralegal assistants to be assigned to TDS. All administrative and logistical support for regional and installation defense counsel would be provided by local commands. When he later informed staff judge advocates of his plans, General Persons emphasized that he understood the support requirement would be a potential source of conflict. Here too, however, he opted for a simple approach.⁹⁴

6. *Cost.* The projected cost of the program also differed substantially from the 1973 plan, \$250,000 as distinct from \$1,700,000. Included in the final figure were all temporary duty and training costs and the salaries of two secretaries for the Chief's office.⁹⁵

Before General Persons submitted his proposal to the Army Chief of Staff, he solicited the views of all staff judge advocates of major commands within the Army. A majority of these SJAs, and also commanders whose views were solicited, supported establishment of TDS. There was, however, a strong undercurrent of skepticism concerning the need for a separate defense organization, some hostility toward the creation of yet another "stovepipe" organization, and concern about the proposal local personnel support requirements.⁹⁶

Without difficulty, TJAG obtained the concurrence of other key staff elements at the Department of the Army and then submitted the proposal to the Chief of Staff of the Army, General Bernard W. Rogers, on 3 February 1978. General Persons recommended immediate implementation of TDS without a test. On 18 March 1978, after consulting the principle Army commanders, General Rogers rejected TJAG's recommendation, but did authorize a one-year test in a major command.⁹⁷

⁹²*Id.*; TDS Hist. File, Memorandum for Chief of Staff, Army, Subject: Establishment of US Army Trial Defense Service-Decision Memorandum (3 Feb. 1978).

⁹³*Id.*

⁹⁴*Id.*

⁹⁵*Id.*

⁹⁶*Id.*; TDS Hist. File, Letter from TJAG to MACOM SJAs (23 Aug. 1977), *supra* note 89.

⁹⁷*Id.*; TDS Hist. File, Decision Memorandum (3 Feb. 1978), *supra* note 92.

General Rogers' caution reflected not only his own desire to see the program in operation before making any final decision, but also the skepticism of some senior Army commanders about the need for TDS. There also existed a strong suspicion that "independent" defense lawyers might unfairly manipulate the criminal justice system to their own ends once they became part of TDS.⁹⁸

PREPARING FOR THE TEST

After coordinating with the Commander, Training and Doctrine Command (TRADOC), General Persons chose TRADOC as the major command for the test. TRADOC was a logical choice because it was geographically compact, had no installations outside the continental United States (CONUS), and its units were not subject to deployment. General Rogers approved the selection.⁹⁹ On 30 March 1978, TJAG sent a lengthy electrical message to the Staff Judge Advocate, TRADOC, Colonel Daniel Lennon, which provided guidance on basic planning elements, including organization and support of TDS field offices and selection criteria for defense counsel.¹⁰⁰ A formal tasking directive from the Secretary of the Army followed soon thereafter on 12 April.¹⁰¹

General Person's most immediate concern was personnel. He knew that the quality of personnel selected for the pilot program would profoundly affect its success or failure. He wanted officers who were mature and experienced in the criminal law field, especially in the supervisory positions.

⁹⁸Using "back channels," General Rogers solicited the candid views of four top Army commanders regarding TDS. One commander responded by pointing out the:

perceptions of commanders who see persons against whom charges have been preferred to go through today's military justice system defended by young military lawyers whose sole motivation when defending a service-person is to get their client off regardless of what means are necessary to do that. I can't fault the lawyers too much for that; it's common practice in our litigious society, and what no doubt taught them at the law schools from which they were graduated.

This commander went on to conclude that TDS might work with "appropriate safeguards." TDS Hist. File, Decision Memorandum (3 Feb. 1978), *supra* note 92.

⁹⁹TDS Hist. File, Memorandum for Chief of Staff, Army from TJAG, Subject: Test Program for US Army Trial Defense Service - Information memorandum (27 Mar. 1978); TDS Hist. File, Memorandum for Chief of Staff, Army from TJAG, Subject: Test Program for US Army Trial Defense Service - Decision Memorandum (31 Mar. 1978).

¹⁰⁰TDS Hist. File, Electrical Message for SJA, TRADOC from TJAG, Subject: Test of Trial Defense Service (30 Mar. 1978).

¹⁰¹TDS Hist. File, Letter, Secretary of the Army to Commander, TRADOC (12 Apr. 1978).

With this need in mind, he designated Colonel Robert B. Clarke, then the Chief of DAD, to become the new Chief of TDS, effective 1 May 1978. Several other important selections were made at the Department of the Army level including those for Colonel Clarke's immediate staff and three RDCs. These spaces were provided from Department of the Army assets.¹⁰²

At the installation level, the personnel problem became more complex because it involved a determination of the location of TDS offices and the number of existing command defense spaces to be transferred to USALSA, as well as the actual selection of personnel. The tasking directive gave The Judge Advocate General final approval authority in all these matters.¹⁰³

With the assistance of Lieutenant Colonel William K. Suter, Chief of the Personnel, Plans and Training office at OTJAG, General Persons and Colonel Clarke made a careful study of the defense counsel requirements for each TRADOC installation. Installation staff judge advocates also submitted detailed information concerning their counsel, as requested by the TRADOC SJA, and made nominations for the defense positions.

General Persons insisted, however, that those nominated had to meet certain criteria. Trial defense counsel, the non-supervisor action counsel, had to be certified as both trial and defense counsel under Article 27(b), UCMJ, have at least twelve months remaining on their service obligation, and not be pending reassignment within one year. *In addition* to these requirements, senior defense counsel, the first-line supervisors, had to have career status and at least two years of actual trial experience, if possible.¹⁰⁴ These prerequisites were high; they clearly reflected General Persons' determination to launch TDS with an experienced crew. In some specific cases, the standards were bent to allow relief to the staff judge advocate. Nevertheless, the majority of judge advocates chosen for the TRADOC program satisfied the selection criteria.

These preparations required a vast amount of coordination among

¹⁰²Some RDC selections were made in March 1978 in anticipation that the Chief of Staff would approve TJAG's recommendation for immediate implementation Army-wide. When General Rogers "turned the tables," these plans were scaled down. Selected for the immediate staff of the Chief of TDS were Major Joe D. Miller, Executive Officers Captain Nicholas Retson, Operations Officer, Captain Malcolm H. Squires, Training Officer, and Captain David Boucher. The first three RDCs were Major Michael Feighny, Fort Dix, Major John Richardson, Fort Benning, and Lieutenant Colonel Robert Berry, Fort Knox.

¹⁰³TDS Hist. File, Letter, *supra* note 101.

¹⁰⁴TDS Hist. File, Electrical Message, *supra* note 100.

TJAG, the TRADOC SJA, subordinate command SJAs, and the Chief of TDS. Moreover, the problems involving “spaces and faces” were only the tip of the iceberg. Colonel Clarke and his staff addressed a host of other matters before the test commenced, including regional organization lines, standard operating policies and procedures, SIDPERS responsibilities, personnel records, budget, training, and uniform patches. One important result of this broad advance planning was the preparation and issuance of a comprehensive standing operating procedure for TDS which defined the duties of all TDS counsel, identified the trigger-points for assignment of counsel to cases, established priorities for all defense duties, and provided numerous other policies and procedures concerning personnel and office management.¹⁰⁵

THE TRADOC TEST

On 15 May 1978, the test commenced at sixteen TRADOC installations. Simultaneously, the Field Defense Services Office merged with TDS and became the Office of the Chief, providing general supervision and control through the regional defense counsel. Structurally, the new organization closely followed General Persons’ plan. Sixteen field offices, each headed by a senior defense counsel, were grouped into three regions. Regional defense counsel were satellited on TDS field offices at Fort Dix, Fort Knox, and Fort Benning, and received their support from the local command.¹⁰⁶ Fifty-one defense counsel were involved, including supervisory personnel.

First priority was to establish TDS and make it work. But there was another task, perhaps more difficult, of gaining the support of commanders for the new program. No test program, however well-conceived or well-run, would win final approval if those whom it served did not give it their support. Politically speaking, the program not only had to work; it also had to be sold. Of course, the political aspects involved in the test program were inextricably intertwined with TDS’ operational responsibilities.

From the test’s inception, those persons responsible for the program stressed the importance of educating and persuading the officials who would have a powerful influence on the ultimate fate of TDS. Regional defense counsel made frequent visits to TRADOC installations to talk with convening authorities, other commanders,

¹⁰⁵Although revisions are made periodically, TDS still uses the same basic SOP issued in 1978.

¹⁰⁶TDS Hist. File, Electrical Message, *supra* note 100.

SJAs, and military trial judges about TDS. During these staff visits, they were expected to tell commanders and others about TDS, explain why it was being tested, listen to their comments, respond to their questions and urge their participation in the coming evaluation process. Similar interaction with staff judge advocates was equally important because most commanders would be strongly influenced by their SJA's views concerning TDS. Each field office's establishment was therefore carefully monitored. Senior defense counsel kept staff judge advocates closely informed of their development.

Another political aspect of the pilot program involved the division of labor between TDS and the installation staff judge advocate. TDS attorneys were required first to represent and counsel soldiers in judicial and administrative proceedings when such representation or counselling was mandated by law or regulation. At some installations, however, these first-priority defense duties would not consume all the attorney-time available. As a matter of policy, the Chief of TDS, therefore encouraged senior defense counsel to "give back" to the SJA as much attorney time as possible on lesser matters, such as administrative elimination actions in which legal representative personnel actions. This "give-back time" was especially meaningful to SJAs at small installations with a low criminal justice workload. All senior defense counsel were required to coordinate the division of responsibility for these lesser duties with the staff judge advocate.

One problem of particular concern to commanders as whether TDS could properly control and supervise defense counsel through a vertical organization. Regional defense counsel were the key to solving this problem. General Persons ruled out any actual trial work by RDCs because it would detract from their supervision. Each RDC was expected to direct all of his or her attention to managing the region and interacting with the counsel under his or her control. Events proved that this was a wise decision.¹⁰⁷

During the TRADOC test, the Chief of TDS and his staff continued to plan for Army-wide implementation of TDS. Colonel Clarke conducted extensive coordination with the SJAs of major commands, particularly Colonel Lloyd Rector, the Forces Command (FORSCOM) SJA, on all the operational details that had to be worked out in advance of any expansion of the program.¹⁰⁸ By March 1979, a substantial amount of planning was completed for the continental Uni-

¹⁰⁷RDCs still do little or no trial or board work.

¹⁰⁸TDS Hist. File, Letter from SJA FORSCOM to FORSCOM SJAs, Subject: US Army Trial Defense Service (26 Oct. 1978). Colonel Clarke and Colonel Rector frequently communicated concerning TDS planning during this period.

ted States Europe, and Korea. All significant problems concerning location of field offices and number of defense spaces for FORSCOM had been solved. TDS would receive a total of seventy-six defense spaces throughout FORSCOM. This final figure was based on an assessment of actual defense needs and not on the number of defense spaces already recognized in FORSCOM. In fact, there were substantially more than seventy-six TOE or TDA defense spaces in FORSCOM.¹⁰⁹

THE 1978 GAO REPORT

During the TRADOC test, there was a reminder of the continuing public concern about military defense organization. On 31 October 1978, the Comptroller General of the United States submitted a General Accounting Office (GAO) report to Congress entitled, "Fundamental Changes needed to Improve the Independence and Efficiency of the Military Justice System." It discussed a number of "problems" with trial and defense counsel organizations in the services which GAO believed, "lead to perceptions that military justice is uneven, unfair, and of low priority."¹¹⁰

GAO acknowledged that the Air Force and the Navy had been operating with separate defense counsel structures since 1974. In GAO's view, these organizations "came closest to allowing both defense and trial counsel to act independently."¹¹¹ Conceptually, however, GAO indorsed a "single" consolidated defense and trial counsel organization within the Department of Defense.¹¹²

Concerning practices in the Army, the GAO took note of the TDS pilot program which had been operating in TRADOC for about five months. But the report concluded that the test was "delaying implementation of a concept which does not need further testing." GAO recommended that the Secretary of Defense direct the Army to implement the TDS "without additional delay."¹¹³

¹⁰⁹TDS Hist. File, Letter, Colonel Rector to Colonel Neinast (21 Mar. 1979). Colonel Clarke did insist on staffing each field office supporting a division with no less than four defense counsel.

¹¹⁰Report to the Congress by the Comptroller General, Fundamental Changes Needed to Improve the Independence and Efficiency of the Military Justice System ii (31 Oct. 1978).

¹¹¹*Id.* at 38.

¹¹²*Id.* at iv., 52.

¹¹³*Id.* at 38.

THE TRADOC EVALUATION

Using the GAO report as a springboard, General Persons made a bid for early approval of TDS. First, he had to gain the support of the TRADOC Commander, General Don Starry. In early December 1978, he asked Colonel Dan Lennon, the TRADOC SJA, to discuss the possibility of an expedited interim evaluation with General Starry.¹¹⁴ Colonel Lennon provided General Starry with a brief personal evaluation of the program on 4 January 1979 and recommended immediate worldwide adoption of the program. General Starry expressed skepticism, but because of his confidence in General Persons, he agreed to support TJAG's position.¹¹⁵

General Persons submitted his proposal to the Chief of Staff in February 1979.¹¹⁶ General Rogers, however, refused to implement the program. On 19 March 1979, TJAG was informed that the Chief of Staff had deferred any decision on implementing TDS "until such time as a comprehensive, complete and conclusive test report is available."¹¹⁷ General Rogers made it clear that he wanted to see all information relevant to the test program before he made a decision. In a letter to General Starry, he emphasized his primary concern that "proper safeguards be identified and institutionalized in a defense counsel system which, while independent, is not obstructive to commanders responsible for discipline and order."¹¹⁸ General Rogers wanted clear and objective proof that the defense structure selected by The Judge Advocate General would not work against the underlying objectives of the military justice system. For that reason, he insisted on an approval process which was extended, thorough, and involved no shortcuts.

After General Rogers' action, the TRADOC test continued. Working closely with TRADOC authorities, the Chief of TDS distributed a detailed questionnaire to general and special court-martial convening authorities, staff judge advocates, trial judges, and all TDS defense counsel. Analyzing the responses, TRADOC found a general consensus that TDS had worked efficiently and professionally that "supervision and control of defense counsel was more

¹¹⁴TDS Hist. File, Letter to SJA, TRADOC from TJAG (8 Dec. 1978); TDS Hist. File, Fact Sheet for CG, TRADOC from SJA, TRADOC (4 Jan. 1979).

¹¹⁵Fact Sheet, *supra* note 114.

¹¹⁶TDS Hist. File, Memorandum for Chief of Staff, Army from TJAG, Subject: Establishment of US Army Trial Defense Service-Decision Memorandum (15 Feb. 1979).

¹¹⁷*Id.*

¹¹⁸TDS Hist. File, Letter to CDR, TRADOC from Chief of Staff, Army (16 Mar. 1979).

readily accomplished without the vulnerability of the Army to allegations of command control,” and that “the perception of [improper] command influences in the military justice system was

Significantly, after seeing TDS operate in their jurisdictions for almost a year, almost all the commanders found that it created no major problems for them. A small minority viewed the test results unfavorably. Their principal concerns were fourfold. First, there were philosophical objections to the stovepipe structure employed by TDS. Secondly, some commanders also questioned whether TDS was really needed. Thirdly, there was criticism of the SJA’s loss of flexibility in providing legal services. Finally, turning the tables a bit, some judge advocates charged that TDS had created an imbalance in expertise between trial and defense counsel; they alleged that TDS had gotten “the cream of the crop.”¹²⁰

The views of staff judge advocates and prosecutors generally paralleled those of commanders. With few exceptions, they supported implementation of TDS Army-wide. In addition to the concerns expressed by commanders, however, several judge advocates pointed out that problems might arise from creating too many one-counsel TDS offices or “locking” a judge advocate into the criminal law field for too long a time.¹²¹

All twelve military judges who presided over trials involving TDS counsel believed the program was a success. In every category, they reported that the courtroom performance of defense counsel equalled or improved over their performance prior to the test. More importantly, the judges concluded that the operational supervision and ethical guidance provided to TDS counsel was greatly improved.¹²²

Trial defense counsel evaluated TDS from a different perspective, but they too concluded overwhelmingly that the organization worked. Significantly, they generally agreed that TDS removed the potential for conflict of interest in their relationship with the staff judge advocate. They also believed that supervision had improved. In the view of their RDC supervisors, TDS provided more effective supervision of defense counsel, improved the quality of representa-

¹¹⁹TDS Hist. File, Memorandum for Chief of Staff, Army from TJAG, Subject: Evaluation of US Army Trial Defense Service - Decision Memorandum (12 June 1979).

¹²⁰*Id.*

¹²¹*Id.*

¹²²*Id.*

tion to soldiers, provided an efficient response to multiple accused cases, caused a reduction in requests by accused soldiers for individual military counsel, and removed the appearance that the defense counsel worked for the staff judge advocate and the command.¹²³

One group whose views were not solicited during the evaluation process were the enlisted members of TRADOC commands. For this reason, one cannot state with certainty whether any adverse perceptions toward the military justice system among TRADOC enlisted soldiers were improved as a result of TDS. When confronted on this issue by several commanders during the TRADOC evaluation, Colonel Clarke was quick to point out that the test was primarily designed to evaluate the *operational* feasibility of the program. He added:

Of course, if we changed any perceptions along the way, as most people thought we did, so much the better. It would, however, have been inappropriate for us to mount a big "PR" campaign before a decision was made on the future of the program. If we get a "green light" on TDS, we will put out a great deal more information in a number of areas. Finally, if we wanted to judge changes in perceptions we would have taken a different approach on the program, *i.e.*, used a smaller group, hired a psychologist, and taken an attitudinal survey.¹²⁴

THE WORLD-WIDE TEST

Armed with the favorable results from TRADOC, General Persons submitted a decision memorandum to the new Army Chief of Staff, General Edward C. Meyer, on 21 June 1979. This time, however, he did not seek immediate implementation. Instead, he recommended an expanded test with the optional participation of overseas

TJAG's caution was justified. The decision not to request Army-wide implementation was made at a meeting on 7 June 1979 attended by General Persons, Major General Lawrence Williams, the Assistant Judge Advocate General, Brigadier General Hugh J. Clausen, the AJAG for Military Law, Brigadier General Harvey, who became TJAG soon thereafter on 1 July, and Colonel Clarke.

¹²³*Id.*

¹²⁴TDS Hist. File, Routing Slip comments for AJAG/CL from Chief, TDS (19 May 1980).

¹²⁵TDS Hist. File, Decision Memorandum (12 June 1979), *supra* note 119.

During the discussion of the approach to take on the TDS decision memorandum, it became apparent that a recommendation for immediate Army-wide implementation might encounter substantial opposition in the Chief of Staff's office. General Williams believed that it would be unwise to take substantial risks, if TJAG could gain approval for a more limited, CONUS-wide implementation. He also believed that TJAG could obtain an option for testing TDS overseas. General Persons agreed with General Williams. He stated that, while he had wanted to see Army-wide implementation during his tenure, he believed this would happen ultimately. Consequently, he then directed the drafting of a decision memorandum recommending the CONUS test expansion with overseas options.¹²⁶

On 19 June 1979, General Meyer approved expansion of the test to all CONUS units, including units in Alaska, Hawaii, and Panama, effective 1 September 1979. Army commands in Europe and Korea were given the option of participating in the test: they too soon agreed to join the program.¹²⁷

The pilot program thus entered its most critical stage. During the next year, TDS had to demonstrate its ability to respond to the unique needs of units with deployment missions. Participation of overseas commands would present significant new problems of control and supervision. Personnel management actions would surely increase because of the greater number of TDS counsel.

Because of the extent of advance planning that had been done during the TRADOC test, TDS was able to move quickly to set the program in operation throughout the CONUS. Specific procedures used were similar to those employed in TRADOC.

On 5 July 1979, the Secretary of the Army issued a directive to all major commands in CONUS authorizing the expanded test. This new directive was much more comprehensive and specific than the

¹²⁶TDS Hist. File, Memorandum for Record prepared by Chief, TDS, Subject: Conference with TJAG Concerning USATDS (8 June 1979).

¹²⁷TDS Hist. File, Letter, CINCUSAREUR to TJAG (23 July 1979). The CINCUSAREUR, General Frederick J. Kroesen, wrote General Alton Harvey (who became TJAG on 1 July 1979):

I support the USATDS concept and am willing for USAREUR to participate; however, my preference is to implement USATDS without testing in Europe. In my opinion, having an expanded test in USAREUR is wasteful since the TRADOC test adequately proved the USATDS's value.

The Commander of the Eighth U.S. Army Korea, General John A. Wickham, Jr., gave his final approval in December 1979. *See* TDS Hist. File, Letter, CDREUSA to TJAG (4 Dec. 1979). For the Korean test, TDS coordinated with Colonel Richard Bednar, the SJA, Eighth U.S. Army, who later served as the AJAG for Civil Law for most of the expanded test.

one issued for TRADOC. It contained detailed provisions on administrative and logistical support for which local commands were responsible and a delineation of mutual support responsibilities of the staff judge advocate and the senior defense counsel.

The directive specifically granted the Chief of TDS broad authority to promulgate rules and requirements governing the establishment of attorney-client relationships, allocation of personnel resources, and the setting of priorities within the various categories of services rendered by TDS counsel. In the performance of their duties, TDS counsel were to strictly comply with these directives. Additionally, however: "once an attorney-client relationship is formed pursuant to these rules and requirements, defense counsel have a positive duty to exercise independent judgment in control of the case, limited only by law and the Code of Professional Responsibility." USATDS immediately revised its operating procedures to incorporate the test directive.¹²⁸

As 1 September 1979 drew near, final administrative arrangements were completed for CONUS, Panama, Alaska, and Hawaii. Regional organizational lines were realigned on a geographical basis; CONUS regions were increased from three to five.¹²⁹ Procedures developed in the TRADOC test for identifying and transferring defense spaces and nominating and selecting new defense counsel were again used. There was one slight difference. Selection criteria for SDCs and TDCs were relaxed. For the expanded test, senior defense counsel were required to have one year of military justice experience rather than two. And the retainability requirement for trial defense counsel was reduced from a year to six months.¹³⁰

Planning for Europe and Korea accelerated. Unlike the Eighth U.S. Army in Korea, the U.S. Army Europe presented special administrative problems because of the number of defense counsel, fifty-four, involved in the European test and the wide dispersal of military units throughout Germany. For this reason, General Persons decided to add an additional supervisory level, a senior regional

¹²⁸TDS Hist. File, HQDA Tasking Directive, Subject: Expanded Testing of US Army Trial Defense Service (5 July 1979). The directive was renewed in 1980 and 1981. It served as the principal authority for TDS' operation until the publication of U.S. Dep't of Army, Reg. No. 27-10, Legal Services-Military Justice, ch. 18(C. 21.21 Sept. 1981).

¹²⁹TDS Hist. File, Planning for Trial Defense Service-FORSCOM, USAREUR, and Korea (1977-1980). During this period two key personnel change occurred in the Office of the Chief. Lieutenant Colonel H. Jere Armstrong became the Executive Officer and Major Michael L. Feighny the new Operations Officer.

¹³⁰*Id.*

defense counsel (SRDC), for European operations only.¹³¹ Additionally, TDS field offices in Europe were grouped into three administrative regions. Other efforts to decentralize TDS operations in Germany were resisted in order to minimize the number of one-counsel defense offices and thus simplify staffing and support.¹³² However, this resistance was largely unsuccessful.¹³³

New TDS operations in the CONUS commenced on 1 September 1979. Germany and Korea followed soon thereafter, on 1 December 1979 and 1 January 1980, respectively.¹³⁴

For the next year, the Army-wide test proceeded. During this time, TDS matured substantially and again proved that it could operate effectively to provide defense services to all types of military units. One of the primary objectives of the expanded test was to evaluate TDS' ability to support combat and combat support units. In order to meet this objective, every senior defense counsel was directed to coordinate with the staff judge advocate and prepare a written memorandum of understanding which defined the field office's responsibilities during mobilization and deployment at the installation.¹³⁵ TDS' responsiveness in deployment situations was tested successfully in numerous exercises at Fort Irwin, California and in Europe (REFORGER).

TDS also proved that it could respond quickly and efficiently in complex legal cases which required a commitment of several defense counsel. It provided counsel for numerous multiple-accused court-martial cases, including a major eleven-man rape case in Panama. It also provided thirteen defense counsel for civilian employee respondents in a formal investigation at the Lexington Bluegrass Army Depot.

Other aspects of the program which were tested successfully included operations in an overseas environment with significant military justice requirements (Europe), the separate defense rating chain, the TDS training program, and a computer-assisted management information system. The computer program, which is still used, was designed to facilitate and enhance the use of monthly management reports by the Office of the Chief and regional defense

¹³¹*Id.*

¹³²*Id.*

¹³³*Id.*

¹³⁴*Id.*

¹³⁵TDS Hist. File, Memorandum for Chief of Staff, Army from TJAG, Subject: Evaluation of US Army Trial Defense Service - Decision Memorandum (20 May 1980).

counsel. It provided the Chief of TDS with a monthly printout of the actions and man-hours in critical work categories for each field office and region.

Operationally, the question of logistical and administrative support for TDS field offices presented the only continuing problem. Clerical support, in particular, varied from command to command, depending on local resources and the attitude of the staff judge advocate toward TDS. Regional defense counsel reported their evaluation of the adequacy of support to the Chief of TDS after each field office visit.

On 29 February 1980, the test period ended. Evaluation procedures used thereafter were very similar to those developed for the TRADOC test. When completed in April 1980, the final evaluation included the views of all major Army commanders, as well as thirty-five general and fifty special court-martial convening authorities. Comments and recommendations were also received from over two-hundred military lawyers assigned as SJAs, trial judges, and defense counsel. There was general agreement that, operationally, TDS was a success.¹³⁶

Once again the principal objection was philosophical; creation of another "stovepipe" command would adversely affect unit cohesiveness. Another familiar critical comment was that TDS was not really needed, despite the alleged perception of improper command control, and that its establishment really changed nothing. As in the TRADOC test, some commanders saw TDS as another dilution of the command function. One commander stated: "The Commander's inability to assert control over those officers who play such a critical role in the . . . disciplinary system is a serious defect in the USATDS concept." Another asserted that the Army was looking the wrong way, adding, "we shouldn't adopt it just for the sake of change; better we concentrate our efforts on gaining understanding and acceptance of the true limits on actions of military lawyers."¹³⁷

Despite these criticisms, approval of TDS was overwhelming. Implementation was recommended by seventy-four percent of commanders, eighty-seven percent of SJAs, ninety-three percent of military judges, and ninety-nine percent of trial defense counsel.¹³⁸ Thereafter, on 20 May 1980, General Harvey recommended to Gen-

¹³⁶*Id.*

¹³⁷*Id.* General Kroesen, the commander of U.S. Army, Europe, submitted a strong recommendation for approval.

¹³⁸*Id.*

eral Meyer that TDS be implemented permanently throughout the Army.¹³⁹

Once the decision paper reached the Chief of Staff, it was evaluated by the Defense Management Office (DMO), a division of the Chief's immediate staff. On 29 May 1980, DMO recommended with some reluctance that TDS be approved.¹⁴⁰ The DMO memorandum contained three interesting observations. First, it pointed out that although seventy-four percent of participating commanders favored implementation, "most troop unit commanders recommend USATDS not be implemented or expressed serious reservations concerning the program." Secondly, it found "a general consensus... that USATDS produces no measurable difference in the quality of defense services provided soldiers." Thirdly, it specifically cited the observation of many commanders that "soldiers are generally unaware that an organizational change has taken place." Other commanders, it added, believed that the allegation of improper command influence within the military justice system is "without foundation." The memorandum concluded, however, that "while specific improvements in legal services under USATDS are negligible, its implementation is a logical extension of previous changes in the administration of military justice and may reduce future criticism of command influence."¹⁴¹

General Meyer still did not act on the recommendation for five months because of a special concern that TDS seemed "at odds" with his unit cohesion policies. Instead, he referred the question of TDS approval to the Army Cohesion Conference in July 1980 and again to the Army Commanders' Conference in October 1980. Both conferences were attended by major Army commanders. There is no evidence, however, that TDS was ever discussed at either meeting.¹⁴²

Finally, on 7 November 1980, General Meyer gave his approval to the program.¹⁴³ All that now remained was to promulgate the authority under which TDS would function. Within days of General

¹³⁹*Id.*

¹⁴⁰TDS Hist. File, Office Memorandum for General Meyer from DMO, Subject: Evaluation of U.S. Army Trial Defense Service (USATDS) (29 May 1980).

¹⁴¹*Id.*

¹⁴²TDS Hist. File, Memorandum for Record, Subject: Meeting of Army Cohesion Conference (24 June 1980); TDS Hist. File, Memorandum for TJAG from Chief, TDS, Subject: TDS Background Information for Army Commanders' Conference (24 Oct. 1980). General Meyer's concern generated efforts within OTJAG to demonstrate that while TDS had fostered cohesion within the new organization, it had not degraded traditional unit cohesion. The briefing papers developed for this purpose were never used. They are contained in the TDS historical file.

¹⁴³TDS Hist. File, Decision Memorandum (20 May 1980), *supra* note 135.

Meyer's action, a draft regulation designed to govern the new organization was submitted to OTJAG. While it was being considered, TDS continued to operate under the Department of the Army test directive.¹⁴⁴ After a long delay, the regulation was issued in September 1981.¹⁴⁵ With these actions, TDS' establishment was completed.

CONCLUSION

TDS was a logical response to the persistent defense-related problems which plagued the administration of the military justice system year after year. In the final analysis, its principal effects were two-fold. First, it provided better protection for defense counsel against actual or potential threats to their professional independence. It reduced the number of opportunities for improper command influences to occur and made their success less likely even if they were attempted. Moreover, it deterred self-imposed limitations on professional independence by defense counsel who feared command reactions.

Secondly, TDS' establishment improved the perception of the defense function in the Army. Within both civilian and military communities there was renewed confidence in the ability of Army defense counsel to represent their clients' best interests without fear of improper command pressures.

TDS also had other important effects. For the first time, trial defense counsel were provided full-time supervision from field-grade defense counsel. Because this supervision occurred within a confidential chain and came from other defense counsel, TDCs sought advice from their supervisors more readily and accepted it more willingly. With respect to competence of counsel, TDS ended the deliberated practice of assigning the least experienced judge advocates as defense counsel, which had prompted General Persons' split certification program. Moreover, it freed staff judge advocates from the ambiguities which had undermined their previous superior-subordinate relationship with defense counsel.

In the final analysis, TDS was an Army solution to an Army problem. Although it was a response in part to external pressures, the initiatives for change which led to its final implementation came from within. The foresight of General Persons, General Harvey,

¹⁴⁴TDS Hist. File, **HQDA** Tasking Directive (5 July 1979), *supra* note 128.

¹⁴⁵U.S. Dep't of Army, Reg. No. 27-10, Legal Services-Military Justice, ch. 18(C.21, 21 Sept. 1981). The basic authority for TDS is now in U.S. Dep't of Army, Reg. No. 27-10, Legal Services-Military Justice, ch. 6 (1 Sept. 1982).

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Colonel Clarke, and others who shaped the program, enabled the Judge Advocate General's Corps to control the change and make it consonant with the Army's needs as a military fighting force.

Individual Status and Individual Rights Under the NATO Status of Forces Agreement and the Supplementary Agreement with Germany*

by Captain David S. Gordon**

This article examines individual status as a member of the forces, a member of the civilian component, and as a dependent under the NATO Status of Forces Agreement (SOFA) and the Supplementary Agreement with Germany. Status under the SOFA is compared with the status of aliens abroad and with that of diplomatic and consular personnel. Whether or not the SOFA creates international individual rights is also discussed. The article concludes that granting SOFA status is a sovereign act of the sending state, which it may perform due to the receiving state's limited waiver of territorial sovereignty. The SOFA creates no individual rights because SOFA status exists to facilitate the sending state's forces military mission, not to benefit individuals.

* The opinions and conclusions expressed herein are those of the author and do not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any other governmental entity. This article is based upon a paper presented in partial fulfillment of the requirements of the 31st Judge Advocate Officer Graduate Course.

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I. INTRODUCTION

Between the signing of the NATO Status of Forces Agreement¹ (NATO SOFA) in 1951 and its entry into force for the United States in 1953, one writer published a preliminary evaluation of the new agreement:

Examination of this "Status of Forces Agreement" indicates that it was made not to establish undue privileges and immunities for the forces of sending states within the territory of receiving states, but only to protect the sending state and its forces from undue expense in regard to taxation where domicile is not intended, customs duties on goods imported only for the performance of official duties, and to maintain for the sending state jurisdiction over offenses which are primarily the interest of that state.²

Since that time, the SOFA has proven to be an unique agreement in the history of international law in its impact on both individuals and governments. The principles in the SOFA and agreements stemming from it, particularly the Supplementary Agreement with the Federal Republic of Germany,³ have governed the lives of countless NATO service members civilian employees, and their dependents during tours of overseas service. The provisions of the SOFA have likewise had their impact on hundreds of German, French, Italian, Belgian, British, Dutch, and other local communities and upon thousands of local national civilians living and working in the areas where NATO troops have been stationed. The NATO SOFA did not redraw the map of Europe, but it has fundamentally changed the ways European and North American governments deal with one another and with one another's armed forces. In it, the several sovereign powers waive their inherent powers over persons and activities located within the borders of their territories across a spectrum and on a scale never before seen since the rise of the European nation-states.⁴

¹Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces, June 19, 1951, 2 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 (entered into force August 23, 1953) [hereinafter cited as NATO SOFA].

²C. Crosswell, *Protection of International Personnel* 117 (1952).

³Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, August 3, 1959, 1 U.S.T. 531, T.I.A.S. No. 5351, 481 U.N.T.S. 262 (entered into force July 1, 1963) [hereinafter cited as *Supplementary Agreement*].

⁴See S. Lazareff, *Status of Military Forces Under Current International Law* 8-18 (1971).

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The SOFA agreements are pragmatic documents designed to ease the functioning of a military force abroad. They set forth the rights and obligations of the forces and personnel sent in fulfillment of the obligations undertaken for the defense of Europe in the North Atlantic Treaty⁵ in the day-to-day dealings with the peoples and governments of the host nations. They create numerous privileges and exceptions to the power of the receiving state which greatly benefit those individuals eligible for them. This article will examine the rules and practices involved in determining who receives status as a member of the force, member of the civilian component, or as a dependent under the SOFA and Supplementary Agreement, how that status is conferred on individuals, how it may be lost, and whether or not the agreements create any individual rights enforceable under international law. This examination will look at other types of individual status under international law, and, by comparing them with status under the SOFA agreements, will attempt to develop a theory of SOFA status. Before examining the nature of individual status, however, it is useful to set out the various privileges eligible individuals may have under the SOFA and Supplementary Agreement.

11. BENEFITS OF SOFA STATUS

Status under the NATO SOFA conveys numerous benefits. Members of the force are exempt from passport and visa regulations and immigration inspection on entering or leaving the territory of the receiving state.⁶ While members of the civilian component and dependents are required to have a passport,⁷ they may be otherwise exempt from these regulations.⁸ Members of the force are likewise exempt from host country alien registration requirements as well as laws governing the control of aliens.⁹ Members of the civilian component and dependents are not necessarily exempt from alien registration and control policies under the terms of the SOFA,¹⁰ but may be exempt in various host countries, such as the Federal Republic of Germany. A member of a force or civilian component may import personal effects and furniture free of duty for the term of service in

⁵North Atlantic Treaty between the United States of America and Other Governments, April 4, 1949, 63 Stat. 221, T.I.A.S. No. 1964, 34 U.N.T.S. 243 (entered into force August 24, 1949) [hereinafter North Atlantic Treaty].

⁶NATO SOFA, art. III(1).

⁷*Id.* at art III(3); Lazareff, *supra* note 4, at 114.

⁸*Id.* at 113-15. There is no visa requirement for civilian component personnel or for dependents in Germany, Supplementary Agreement, art. 6.

⁹NATO SOFA, art. III(1).

¹⁰Lazareff, *supra* note 4, at 114-15.

the receiving state, upon arrival in the receiving state or at the time of the arrival of dependents." In Germany, this right to duty-free importation of personal effects exists throughout the individual's tour of service in the Federal Republic.¹² Members of the force or civilian component may import their private motor vehicles free of duty, provided the vehicles are for their personal use or the use of their dependents.¹³ All goods imported free of duty may be likewise re-exported freely.¹⁴ Under the SOFA, privately owned vehicles are normally registered by the authorities of the receiving state.¹⁵ Under the Supplementary Agreement with Germany, the sending states' forces are permitted to perform their own vehicle inspection and registration procedures.¹⁶ The host country must either accept as valid driver's licenses issued by the sending state or issue driver's licenses to members of the force, civilian component, and dependents without requiring any form of driving examination.¹⁷ The host country may require personnel having status under the SOFA to pay road taxes on their motor vehicles.¹⁸ However, the Supplementary Agreement makes such vehicles exempt from German road taxes,¹⁹ and agreements with other NATO countries may exempt one or more vehicles from that country's road tax.²⁰

One of the principal benefits gained by having status under the SOFA is that such persons may make purchases of duty and tax free goods from sending state sales outlets, such as post exchanges, commissaries, and eating facilities.²¹ Some such items purchased duty and tax free, such as gasoline, liquor, tobacco, and other items which are highly taxed in the receiving state, are rationed pursuant to agreements between the sending state and the host nation authori-

¹²NATO SOFA, art. XI(5). Note that Article XI(1) reaffirms the authority of the receiving state to regulate imports and exports by SOFA personnel, except where that authority is expressly waived.

¹³Supplementary Agreement, art. 66(1).

¹⁴NATO SOFA, art. XI(6).

¹⁵NATO SOFA, art. XI(b); Supplementary Agreement, art. 66(6).

¹⁶Lazareff, *supra* note 4, at 408-09.

¹⁷Supplementary Agreement, art. 10.

¹⁸NATO SOFA, art. IV; Supplementary Agreement, art. 9.

¹⁹NATO SOFA, art. XI(6).

²⁰Supplementary Agreement, art. 68. See art. 68, Protocol of Signature to the Supplementary Agreement para. 2(d) [hereinafter Protocol of Signature].

²¹For example, personnel assigned to NATO-SHAPE Support Groups (U.S.) in Belgium are exempt from the Belgian road tax on one privately owned vehicle. Agreement between the Supreme Headquarters Allied Powers, Europe and the Kingdom of Belgium on the Special Conditions Applicable to the Establishment and Operation of this Headquarters on the Territory of the Kingdom of Belgium (SHAPE-/Belgium Agreement), May 12, 1967.

²²NATO SOFA, art. XI(4); Supplementary Agreement, art. 65(2).

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ties.²² In addition to being able to purchase goods tax and duty free from sending state's outlets, personnel with SOFA status are likewise permitted to purchase goods and services from the local economy under the same conditions as would be applicable to local nationals.²³ Personnel having SOFA status are permitted to send and receive mail through the Army Post Office system (APO) which permits the mailing of letters and packages at sending state domestic rates to and from the receiving state and the sending state.²⁴ APO privileges frequently make it possible for personnel to import into the receiving state goods from the sending state duty free.²⁵

Members of the force and the civilian component are exempt from all taxes on income received from the government of the sending state.²⁶ Additionally, they are exempt from taxes imposed by virtue of residing in or being domiciled in the receiving state including, but not limited to, taxes on movable property.²⁷ Normally personnel with SOFA status will not be exempt from indirect taxes on goods and services, such as value added taxes.²⁸

All personnel having status under the SOFA have a duty to respect the laws of the host nation.²⁹ All personnel granted SOFA status are subject to the criminal jurisdiction of the receiving state.³⁰ Because of United States Supreme Court decisions indicating that military courts-martial have no jurisdiction over civilians abroad in peacetime,³¹ host nation judicial authorities have exclusive jurisdiction over all criminal acts committed by civilian component members and

²²*E.g.*, Notes Exchanged Between the United States and the Federal Republic of Germany (Nos. 40, 42), August 3, 1959, with appended agreements.

²³NATO SOFA, art. IX(1).

²⁴In Germany, operation of the Army Post Office system is permitted by Supplementary Agreement, art. 59. Various bilateral agreements permit the operation of the APO system in other receiving states. See Lazareff, *supra* note 4, at 390-91.

²⁵Such is the case in the Federal Republic of Germany, where Articles 59 and 66 of the Supplementary Agreement make such duty-free importation possible.

²⁶NATO SOFA, art. X; Supplementary Agreement, art. 68, Protocol of Signature.

²⁷*Id.*

²⁸Under NATO SOFA, art. X, SOFA personnel are exempt from taxes based on residence or domicile. Taxes on goods and services, such as value added taxes, are not based on domicile or residence in the various receiving states, but are levied on all purchasers without regard for domicile or residence. The power to levy such taxes on SOFA personnel is specifically reserved to the receiving state in Article X(2). However, the German authorities have permitted SOFA personnel to obtain relief from the *Mehrwertsteuer*, or Value Added Tax, by making purchases on the German economy through an official procurement agency of the force.

²⁹NATO SOFA, art. II.

³⁰*Id.* at art. VII.

³¹*Kinsella v. Kruger*, 361 U.S. 234 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Reid v. Covert*, 354 U.S. 1 (1957).

dependents.³² However, other sending states are not so restricted and may try their civilian component members and dependents by courts-martial or some other form of sending state tribunal.³³ While American authorities may not court-martial civilian component members or dependents, they may take administrative adverse action against them.³⁴ Military personnel having status under the SOFA are subject to U.S. military jurisdiction as well as host nation jurisdiction. Depending on the nature of the offense, the sending state military authorities or the receiving state authorities have either exclusive or concurrent jurisdiction; the issue of who has primary right to try the case is determined by whether the victim of the offense was the sending state or its personnel or the host country or its people.³⁵

A perspective of these privileges and the persons who benefit from them may best be gained by looking at other types of individual status and privilege recognized in international law.

111. THE STRANGER IN A STRANGE LAND: A BRIEF HISTORY AND DESCRIPTION OF THE LAW GOVERNING ALIENS, DIPLOMATS, AND CONSULAR PERSONNEL

Individuals having status under the SOFA agreements are foreigners. They live their lives in nations of which they are not citizens. Many practical principles may be gathered by comparing and contrasting the rights and limitations of the SOFA personnel with other categories of persons living abroad. The first such category we will consider is that of the alien living abroad in a completely private capacity.

³²NATO SOFA art. VII(1)(a) permits the sending state to exercise criminal jurisdiction "over all persons subject to the military law of that State." Since the only military law currently in effect for the United States is the Uniform Code of Military Justice, 10 U.S.C. §§ 801-934 (1976), the Supreme Court's decisions cited in note 31 *supra* place all civilian component personnel and all dependents under the exclusive jurisdiction of the receiving state.

³³For example, Canada exercises Court-martial jurisdiction over members of the civilian component and dependents. National Defence Act, Can. Rev. Stat. Chap. N-4 §§ 55(1)(f), 55(4), 55(5) (1970).

³⁴See *e.g.*, U.S. Army Europe, Reg. No. 27-3, Misconduct by Civilians Eligible to Receive Individual Logistic Support (5 Jan. 82).

³⁵NATO SOFA, art. VII. The intricacies of the operation of criminal jurisdiction under Art. VII are beyond the scope of this thesis. See *Lazareff, supra* note 4; J. Snee and K. Pye, Status of Forces Agreement: Criminal Jurisdiction (1957).

A. THE ALIEN

Throughout legal history, the alien has normally been subject to legal disabilities or discriminatory treatment under host nation law. In early Rome, for example, there developed the two distinct jurisprudences of the *ius civile* and the *ius gentium*; the former applied between Roman citizens, the latter applied to cases between Roman citizens, the latter applied to cases between Roman and foreigner and between foreigners living within the Roman ambit. Ancient law was largely personal, rather than territorial, in nature; the law by which a man lived was determined not so much by where he lived as by his citizenship. This principle created problems for the development of Roman law. In some cases, such as in the law of succession, the Roman law applied the law of the deceased's homeland. However, in many cases, for instances a contract dispute between a Roman and an Athenian, it would have been undesirable to apply the law which would govern the Athenian in his home city for that might prejudice the Roman, and unpolitic to apply the *ius civile* for that would mean treating the foreigner as a Roman. Rather than develop a system of conflict of laws rules to determine whose law would govern the case, such as we use today, the Roman law developed an entirely separate body of law governing relationships with resident foreigners.³⁶ Roman citizens, and rights and privileges conveyed by the *ius civile* were not available to the foreigner unless a similar privilege was conveyed by the *ius gentium*.³⁷ The *ius gentium* was probably developed by selecting rules of law common to Rome and the various foreign communities (which were primarily located on the Italian peninsula) from which the immigrants came to Rome. Thus, the *ius gentium*, "the law of nations," was a compilation and Romanization of these common legal principles.³⁸ Not having the rights under the *ius civile* meant that the foreigner could not make use of some of the various contractual forms³⁹ available under the *ius civile*, or contract marriage with a Roman citizen, or make or take under a Roman will. He could, however, have enforceable contractual rights under the *ius gentium*.⁴⁰

The alien was likewise subject to disabilities and discriminatory treatment under the law of medieval England. While the alien could

³⁶B. Nicholas, *An Introduction to Roman Law* 57-58 (1962).

³⁷*Id.* at 64.

³⁸H. Maine, *Ancient Law* 46-52 (1861).

³⁹The alien could not make use of the *mancipatio*, a formal transaction transferring certain things such as slaves, beasts of draught and burden, Italic land, and certain servitudes on such land. Nicholas, *supra* note 36, at 64, 63, 105-06.

⁴⁰See H. Maine, *supra* note 38, at 61-64.

reside and trade in England, his presence and activities were regulated by his charter from the English king.⁴¹ An alien could not land in England.⁴² If he inherited land according to the common rules of inheritance, he would be bypassed in favor of an English subject. If the alien obtained land by sale, lease, or gift, the king could seize and keep the land for himself should he so desire.⁴³ The only exception was that an alien merchant could hire a house for the purposes of his sojourn and his trade.⁴⁴ Alien merchants were guaranteed under Magna Carta the right to freely enter into, dwell in, and leave the realm,⁴⁵ but were subject to the often restrictive regulation of the city of London and other boroughs.⁴⁶ Cases involving alien merchants were heard by the Court of Chancery rather than by the law courts, for the merchants received a hearing as men granted a privilege by the king, rather than as men subject to the common law.⁴⁷

Under more modern concepts of international law, an alien comes at once under the territorial supremacy⁴⁸ of the foreign state upon his entrance into the state, while at the same time he remains under the personal supremacy of his home state.⁴⁹ Generally speaking, the admission or nonadmission of aliens is regulated by the municipal law of the receiving state. While there is some contrary authority,⁵⁰ a state is free to accept aliens into its territory or exclude them either partially or entirely as it sees fit. Likewise, aliens are subject to expulsion from the territory of the receiving state according to the provisions of the receiving state's domestic law.⁵¹ Aliens may be required to register with the local authorities.⁵² The receiving state

⁴¹F. Pollock & F. Maitland, *the History of English Common Law* 464 (1899).

⁴²*Id.* at 461.

⁴³*Id.* at 459.

⁴⁴*Id.* at 465.

⁴⁵Magna Carta of King John, ch. 41 (1215). *See also* Charter of King Edward I, ch. 30 (1297).

⁴⁶F. Pollock & F. Maitland, *supra* note 41, at 464-65.

⁴⁷*Id.* at 466.

⁴⁸"Territorial supremacy" is the term Oppenheim used to describe the power of a state to exercise supreme authority over all persons and things within its territory. "Personal supremacy" comprises the power of a state to exercise supreme authority over its citizens at home and abroad. 1 L. Oppenheim, *International Law* 283 (L. Laugherpacht 8th ed. 1955).

⁴⁹*Id.* at 679.

⁵⁰*E.g.*, 2 D. O'Connell, *International Law* 753-54 (1965). In some cases, states have by treaty relinquished the right to exclude aliens who are nationals of their treaty partners. The principle example is the European Communities, who have agreed to all each others nationals a generally free right of entry. Treaty Establishing The European Economic Community, Art. 48, March 25, 1957, 298 U.N.T.S. 11 [hereinafter cited as Treaty of Rome].

⁵¹I. Brownlie, *Principles of Public International Law* 505 (2d ed. 1973).

⁵²*E.g.*, Immigration Act of 1971, § 4(3) (U.K.).

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may impose restrictions upon the employment of aliens, such as requiring a work permit prior to employment,⁵³ and may subject aliens to special regulation or bar them from practicing a profession.⁵⁴ Restrictions may be placed on an alien's participation in a business enterprise.⁵⁵ Owning real property may be regulated or prohibited to aliens.⁵⁶ The alien is normally subject to all import and export duties and is subject to all forms of taxation based on property, income, or transactions,⁵⁷ although the alien may receive some relief through tax treaties between the receiving and home state.⁵⁸ An alien may be required to serve in the local police and fire services if his services are needed to maintain public order and safety, and may be required to perform other public services on the same basis as nationals of the receiving state.⁵⁹ It is generally conceded that a state may compel an alien to perform military service on behalf of the state in which he resides,⁶⁰ although there are commentators who assert that, because military service is a duty required by personal supremacy rather than by territorial supremacy, the resident alien may not be compelled to perform military service without the consent of his home state.⁶¹ Most commentators agree that the property of a resident alien is subject to government expropriation, provided that it is done on the same terms as apply to local nationals.⁶² Aliens are likewise subject to host country rules for intestate succession and testamentary donation.⁶³ Aliens normally have access to the court system equal to that of local nationals, although they may not be

⁵³The U.S. "H" visa, which permits a nonimmigrant alien to secure temporary employment in the U.S., is an example of this type of control Fraade & Artan, *Temporary Employment of Foreign Nationals: the "H Visa"*, 14 *The Int'l Law.* 235 (1980).

⁵⁴*E.g.*, Code Judiciaire [Belg.] art. 428 (Law of Oct. 10, 1976), which bars non-nationals from the profession of *avocat*.

⁵⁵An example of the type restrictions placed on alien's participation in business ventures may be found in Shamma & Morrison, *Qualification, Licensing and Registration of Foreign Companies in Saudi Arabia*, 11 *The Int'l Law* 693-99 (1977).

⁵⁶*E.g.*, Foreign Investment in Real Property Tax Act of 1980, Pub. L. No. 96-499, § 1121-1129, 94 Stat. 2682 (1980) (codified at Internal Revenue Code § 846); Habif, *FIRPTA Reporting: New Headache for the Foreign Investor*, 19 *Ga. St. Bar J.* 137-41 (1983).

⁵⁷*E.g.*, G. Hackworth, *Digest of International Law* 6-12 (1941); 1 Oppenheim, *supra* note 48, at 680-81.

⁵⁸*E.g.*, Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, July 22, 1954, 5 U.S.T. 2768, T.I.A.S. No. 3133, 239 U.N.T.S. 3.

⁵⁹*E.G.*, Brownlie, *supra* note 51, at 506-07; 1 Oppenheim *supra* note 48, at 681.

⁶⁰2 O'Connell, *supra* note 50, at 762-64.

⁶¹*E.g.*, 1 Oppenheim, *supra* note 48, at 681.

⁶²Brownlie, *supra* note 51, at 516-21.

⁶³*E.g.*, 2 O'Connell, *supra* note 50, at 759-60. *But cf.* W. Newton, *International Estate Planning* §§ 1.08-09, 2.02 (1981).

empowered by local law to sue another alien for an act committed outside the territory of the host country although in a similar situation, a local national could bring such a suit.⁶⁴

A state may act on behalf of its nationals residing abroad. As Vattel wrote: "[a]n injury to the citizen is an injury to the state."⁶⁵ This epigram does not cover all aspects of a state's ability to protect its nationals abroad, but does span the gap between two fundamental principles of international law and the practical need of a state to act on behalf of its nationals abroad. The first of these two principles is the concept that states not individuals, are the persons and actors under international law.⁶⁶ If a state did not have the right to act on behalf of its nationals, wrongs committed against individuals would not be amenable to resolution under international law. The second principle is that states are sovereign and equal; therefore, one state may not interfere in the internal affairs and acts of another.⁶⁷ Without a third principle, such as the one formulated by Vattel, it would be improper for one state to concern itself with the internal affairs in the territory of another sovereign power.

Vattel's principle, however as the other two, must be qualified or it would justify stronger states using the alleged mistreatment of their nationals as a pretext to interfere in the internal affairs of weaker states. Consequently, the international community has developed two standards for determining whether or not a state may step in on behalf of its nationals residing abroad. The first of these standards is the "national treatment" standard, which provides that the resident alien is entitled to equal, but no better, treatment by the host government than is given to its own nationals. As long as the alien is treated in much the same way as the nationals of the state, with the caveat that the widely accepted practices of alien control and regulations discussed above are excepted, the government of the alien's home state has no ground in international law to protest any adverse treatment their nationals receive in the foreign country.⁶⁸ Since the beginning of the twentieth century, an opposing standard, the "international minimum standard," has been proposed and adopted by some states. The "international minimum standard" is based on the concept that there is an established standard of civilized treatment

⁶⁴*E.g.*, F. Dawson & I. Head, *International Law National Tribunals and the Rights of Aliens* 109-14 (1971).

⁶⁵"Quiconque maltraite un citoyen offense indirectment L'Etat, qui doit proteger ce citoyen." *Le droit des gens*, Bk. II, Ch. VI, para. 71.

⁶⁶*E.g.*, P. Jessup, *A Modern Law of Nations* 15 (1968).

⁶⁷*E.g.*, 2 Hackworth, *supra* note 57, at 1-2.

⁶⁸*E.g.*, Brownlie, *supra* note 51, at 509-10.

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governing the treatment of individuals in general and aliens in particular. This notion, which harks back to the Roman *ius gentium*,⁶⁹ looks at the principles of treatment common to the group of states viewed as being civilized, *i.e.*, the group of nations which share the common Western European Christian and Enlightenment view of man.⁷⁰ As Brownlie has pointed out, the need for an international minimum standard did not arise until the beginning of this century. In fact, the principle of national treatment had support of many jurists in Europe and in Latin America prior to 1940.⁷¹ The perceived need for an international minimum standard resulted because of the broader participation of states from backgrounds other than that of Western European culture in international activities.⁷² As a practical matter, the question is moot within the context of the North Atlantic Alliance, since most of the nations party to the North Atlantic Treaty and the NATO SOFA are those nations whose laws the international minimum standard was derived. Within this group of nations, the protections afforded by the national standard and the international minimum standard are essentially the same, but the actual requirements of national treatment are more readily ascertainable.

B. DIPLOMATIC AND CONSULAR OFFICIALS

1. Diplomatic personnel.

The operative difference between aliens residing abroad for private purposes and diplomatic and consular officials is that the latter categories of personnel are the agents of a sovereign state who are in the receiving state in an official capacity. Their official capacity is recognized by the sending state, the receiving state, and the international community. While envoys from one people to another have existed throughout history, such representatives were employed on an ad hoc basis until the middle of the 15th century, when the present system of permanently stationed envoys began. After the Treaty of Westphalia in 1648, permanent diplomatic representation became the rule throughout Europe.⁷³ The international law of diplomatic representation has developed primarily through custom, with periodic codification of customary law being made through various treaties, such as the Congress of Vienna and its amending protocol of

⁶⁹Nicholas, *supra* note 36, at 54-57. But see Maine, *supra* note 38, at 52-53.

⁷⁰Oppenheim, *supra* note 48, at 48-51.

⁷¹Brownlie, *supra* note 51, at 510.

⁷²*Id.*

⁷³G. von Glahn, *Law Among Nations: An Introduction to Public International Law* 369-70 (1965).

Auxila-Chappelle (1818).⁷⁴ The most recent effort at codifying the rule of diplomatic representation is the Vienna Convention on Diplomatic Relations,⁷⁵ which is largely a codification of the customary international law.

States may interact by means of varied agents; diplomatic agents are but one of these means. Not all those who go abroad in the service of their governments are diplomats, nor are all government agents abroad entitled to the privileges and immunities of diplomats. If there is an essential quality needed for a group or an individual to have diplomatic status, it is that they are sent to officially represent the interests of their government to another state's government and that they are received as being the representatives of their government's interest by the government of the other state. In other words, an individual is a diplomat because the sending government calls him or her a diplomat and the receiving government also calls him or her a diplomat. While this definition may be circular, it is nonetheless an accurate description. While the Diplomatic Convention sets forth some categories of diplomatic personnel,⁷⁶ states are not limited to the enumerated categories, but may create other categories of diplomatic personnel simply by agreeing to treat them as diplomats.⁷⁷ While a diplomat is normally the representative of one state to another state, a diplomat may also be the representative of a state to an international organization, or vice versa, or may be the representative of one international organization to another international organization.⁷⁸

Because of their official capacity, diplomatic personnel are afforded numerous privileges and immunities unavailable to their fellow nationals residing in the same foreign country without diplomatic status. As Brownlie stated:

⁷⁴*Id.* at 370.

⁷⁵Vienna Convention on Diplomatic Relations, April 18, 1961, 3 U.S.T. 3227, T.I.A.S. No. 7502, 50 U.N.T.S. 95 (entered into force for the U.S. Dec. 13, 1972) [hereinafter Diplomatic Convention].

⁷⁶*There* are three classes of heads of mission: ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank; envoys, ministers and internuncios accredited to Heads of State; charges d'affaires accredited to Ministers for Foreign Affairs. *Id.* art. 14.

⁷⁷*E.g.*, Agreement on Military Liaison Missions Accredited to the Soviet and United States Commanders in Chief of the Zones of Occupation In Germany (Huebner-Malinin Agreement), April 3, 1947. The Huebner-Malinin Agreement confers what are in essence diplomatic privileges on the members of the U.S. Military Liaison Mission (USMLM) and the Soviet Military Liaison Mission (SMLM).

⁷⁸*E.g.*, 7 M. Whiteman, Digest of International Law 16 (1970).

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The essence of diplomatic relations is the exercise by the sending government of state functions on the territory of the receiving state by licence of the latter. Having agreed to the establishment of diplomatic relations, the receiving state must take steps to enable the sending state to benefit from the content of the licence.

This license results in a body of privileges and immunities for the diplomatic mission and its personnel. The persons of diplomatic agents⁸⁰ are inviolable, and such agents are not liable to any form of arrest or detention.⁸¹ The receiving state is required to treat diplomatic agents with "due respect" and to take all appropriate steps to prevent attacks on the persons, freedoms, or dignity of diplomatic agents.⁸² Diplomatic agents are immune from the jurisdiction of local courts, but are not exempt from the substantive law. This immunity may be waived by the sending state; the local law would then be operative and local courts would have jurisdiction.⁸³ Diplomatic personnel⁸⁴ have a duty to respect the laws of the receiving state.⁸⁵ The immunity of diplomatic agents applies to immunity from all criminal prosecution in the receiving state.⁸⁶ Diplomatic agents are generally immune from the civil and administrative jurisdiction of the receiving state, except in cases involving private immovable property not held on behalf of the sending state, in succession actions, where the diplomatic agent is an executor, administrator, heir or legatee in his private capacity, or in an action relating to any professional or commercial activity carried on in the receiving state outside official functions.⁸⁷ These immunities are both for acts committed in the course of official duties as well as for acts outside the scope of official duties.⁸⁸ However, in the case of private acts, immunity is lost when the individual ceases to be accredited as a diplomat.⁸⁹ These immunities apply to all measures of execution against the person or

⁷⁹Brownlie, *supra* note 51, at 334.

⁸⁰Diplomatic Convention, art. 1(e), defines a "diplomatic agent" as "the head of the mission or a member of the diplomatic staff of the mission."

⁸¹*E.g.*, 7 Whiteman, *supra* note 78, at 131-32.

⁸²Diplomatic Convention, art. 29.

⁸³Brownlie, *supra* note 51, at 342.

⁸⁴"Diplomatic personnel," as used in this article, means all those persons enjoying diplomatic privileges and immunities, to include dependents.

⁸⁵Diplomatic Convention, art 41(1).

⁸⁶*Id.* at art. 31(1).

⁸⁷*Id.*

⁸⁸*See id.* at art. 37(2); 7 Whiteman, *supra* note 78, at 417

⁸⁹Brownlie, *supra* note 51, at 344.

property of the diplomatic agent.⁹⁰ Diplomatic personnel are generally exempt from all forms of taxes imposed by the receiving state, although they may have to pay indirect taxes, such as a value added tax or a sales tax.⁹¹ Diplomatic agents are exempt from customs duties,⁹² military obligations,⁹³ social security provisions,⁹⁴ and the requirement to give evidence as a witness.⁹⁵ Members of the administrative and technical staff,⁹⁶ together with the dependents of diplomatic personnel,⁹⁷ enjoy the same privileges and immunities, except that the immunity from civil and administrative jurisdiction does not extend to acts done outside the scope of their official duties.⁹⁸

2. Consular Personnel.

The traditional view is that consuls, although agents of the sending state, are not diplomats and therefore have no diplomatic status.⁹⁹ They are not accorded the same immunities nor the degree of immunity enjoyed by a diplomatic agent.¹⁰⁰ Generally, consuls prepare trade reports, supply commercial information, arrange for trade fairs, and engage in other activities to promote commerce. They also supervise and aid shipping by assisting in customs clearance procedures, quarantine, and immigration matters and by settling disputes among sailors or between sailors and their ships according to sending state national law.¹⁰¹ Consuls are principally concerned with the protection of their state's nationals. They normally give advice and assistance to their nationals in dealings with local governments and, if required, intervene on their behalf to secure the benefits of treaty rights or to protect their rights under international law.¹⁰² They attempt to insure that their nationals have proper legal advice if accused of a crime.¹⁰³ If a national is detained or arrested by host nation authorities, consuls monitor the confine-

⁹⁰Diplomatic Convention, arts. 31(3), 32(4).

⁹¹*Id.* at art. 34; Brownlie, *supra* note 51, at 346.

⁹²Diplomatic Convention, art. 36.

⁹³*Id.* at art. 35.

⁹⁴*Id.* at art. 33.

⁹⁵*Id.* at art. 31(2).

⁹⁶*Id.* at art. 1(f) defines "members of the administrative and technical staff" as "the members of the staff of the mission employed in the administrative and technical service of the mission."

⁹⁷The Diplomatic Convention does not use the term "dependents," but rather uses the phrase "the members of the family . . . forming part of his household." *E.g.*, *id.* at art. 37. This phrase is not elaborated upon.

⁹⁸*Id.* at art. 37.

⁹⁹2 O'Connell, *supra* note 50, at 998.

¹⁰⁰Brownlie, *supra* note 51, at 347.

¹⁰¹2 O'Connell, *supra* note 50, at 994-96.

¹⁰²*Id.* at 995; 4 Hackworth, *supra* note 57.

¹⁰³2 O'Connell, *supra* note 50, at 995.

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ment to make sure they are detained under satisfactory conditions and have necessary access to the outside world.¹⁰⁴ In some cases, consuls will represent their nationals in civil litigation and will administer the estate of deceased nationals.¹⁰⁵

While it is possible for a diplomat to do consular tasks, and, at times, for a consul to do diplomatic tasks, the decisive difference between the two lies in the avenues of the approach to the receiving government available to each of them. A consul has no access to the host nation government except through his or her own embassy, and therefore deals with local officials only; a diplomat transacts business directly between the two governments.¹⁰⁶

The status of consuls is normally determined by bilateral treaties and by general usages between states. These general usages do not rise to the level of customary international law,¹⁰⁷ in that they are by no means universally practiced. However, many of these general usages have been codified in the Vienna Convention on Consular Relations.¹⁰⁸

Unlike diplomatic personnel, consular officers¹⁰⁹ are not immune from criminal prosecution by the receiving state.¹¹⁰ Criminal proceedings against consular officers should, however, consider the officer's official position and should be carried out in a manner which will hamper the exercise of the consular officer's official functioning as little as possible. Consular officers may be arrested or placed in detention pending trial, but only in cases involving a grave crime and then only on the basis of a judicial determination.¹¹¹ With two exceptions, consular officers and consular employees¹¹² are not subject to judicial or administrative actions by the host nation authorities for acts performed in the exercise of their official duties. These two exceptions are when there is a dispute arising out of a contract which the consular official did not make, either expressly or implicitly, as

¹⁰⁴Whiteman, *supra* note 78, at 626-27.

¹⁰⁵Hackworth, *supra* note 57, at 824-26.

¹⁰⁶O'Connell, *supra* note 50, at 998-99.

¹⁰⁷Brownlie, *supra* note 51, at 347.

¹⁰⁸Vienna Convention on Consular Relations, April 24, 1963, 1 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 487 (entered into force for the U.S. Dec. 24, 1969) [hereinafter cited as Consular Convention].

¹⁰⁹*Id.* at art. 1(1)(d) defines "consular officer" as "any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions."

¹¹⁰Whiteman, *supra* note 78, at 785.

¹¹¹Consular Convention, art. 41(1).

¹¹²*Id.* art. 1(1)(e) defines "consular employees" as "any person employed in the administrative or technical services of a consular post."

an agent of the sending state¹¹³ and in a civil action brought by a third party for damage caused by a vehicle, vessel, or aircraft in the receiving state.¹¹⁴ Members of the consular post¹¹⁵ are not obligated to give evidence regarding matters connected with their official functions. In other matters, consular officers may decline to give evidence, but a consular employee or member of the service staff¹¹⁶ may not refuse to give requested evidence.¹¹⁷ Consular officers, consular employees, and members of their families are exempt from alien registration and resident permit requirements,¹¹⁸ from work permit requirements,¹¹⁹ and from social security provisions in effect in the receiving state.¹²⁰

Consular officers and consular employees and members of their households are exempt from all taxes imposed by the host state or its subdivisions, except indirect taxes, such as value added taxes, taxes on private immovable property, such as real estate, which is not part of the consular premises, and taxes on privately generated income and income derived from private sources within the receiving state.¹³¹ Articles imported for personal use of a consular officer, consular employee, or members of their families are normally exempt from customs duties. However, such exemption is not automatic; the extent of such an exemption is determined by the laws and regulations adopted by the receiving state.¹²²

If a member of the consular post or a family member dies in the receiving state, the receiving state is required to permit the export of the deceased's movable property, except for property acquired in the receiving state which cannot legally be exported.¹²³ No estate succession or inheritance duties may be levied on the deceased's movable property, provided that the property was in the receiving state solely because the deceased or the deceased's sponsor was a member of the consular post.¹²⁴ However, estate, succession, or inheritance duties

¹¹³*Id.* at art. 43(1).

¹¹⁴*Id.* at art. 43(2).

¹¹⁵*Id.* at art. 1(1)(g) defines "member of the consular post" as "consular officer, consular employees, and members of the service staff."

¹¹⁶*Id.* at art 1(1)(f) defines "member of the service staff" as "any person employed in the domestic service of a consular post."

¹¹⁷*Id.* at art. 44.

¹¹⁸*Id.* at art. 46.

¹¹⁹*Id.* at art. 47.

¹²⁰*Id.* at art. 48.

¹²¹*Id.* at art. 49.

¹²²*Id.* at art. 50.

¹²³*Id.* at art. 51(a).

¹²⁴*Id.* at art. 51(b).

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may be levied by the receiving state on movable property which is in the receiving state for reasons other than the deceased's consular service, *e.g.*, for private, income producing activities.¹²⁵

Members of the consular post and their families are exempt from all personal service, public service, and military obligations, including military support obligations.¹²⁶ All persons enjoying consular privileges have a duty to respect the laws and regulations of the receiving state and a duty not to interfere in the internal affairs of that state.¹²⁷ Members of the consular post are required to carry liability insurance for the use of vehicles, vessels, or aircraft, and must comply with the requirements imposed by the laws and regulations of the receiving state.¹²⁸

It is possible under the Consular Convention for nationals or permanent residents of the receiving state to be consular officers or consular employees,¹²⁹ but their privileges and immunities may be severely limited. Consular officers in this category enjoy immunity from civil jurisdiction and have personal inviolability only for official acts.¹³⁰ They may not be required to give evidence concerning the exercise of their official duties, although they may be required to give evidence on any other matter under the laws of the receiving state.¹³¹ The receiving state may, if it wishes, extend greater privileges to consular officers who are nationals or permanent residents.¹³² Members of the family of such consular officers are entitled to no privileges except those which the receiving state may choose to give them.¹³³ Other members of the consular post and members of their families who are nationals or permanent residents of the receiving state are likewise not entitled to any privileges unless the receiving state chooses to extend privileges to them.¹³⁴

The discussion of aliens, diplomats, and consular officials establishes a general basis for discussing SOFA status. The following section will discuss the concept of individual rights under international law, and likewise establish a general basis for determining

¹²⁵*Id.* at art. 41(1)(c).

¹²⁶*Id.* at art. 52.

¹²⁷*Id.* at art. 55.

¹²⁸*Id.* at art. 56.

¹²⁹Whiteman, *supra* note 78, at 562-69.

¹³⁰Consular Convention, art. 71(1).

¹³¹*Id.* at arts. 71(1), 44(3).

¹³²*Id.* at art. 71(1).

¹³³*Id.* at art. 71(2).

¹³⁴*Id.*

whether or not the SOFA agreements create individual rights in international law.

IV. INDIVIDUAL RIGHTS IN INTERNATIONAL LAW

A classic doctrine of international law is that states are the only actors who have standing in international law. Individuals are not persons in the law of nations and may not enforce their rights in the international community.¹³⁵ Individuals' claims against foreign nations may be brought only by their nation, if at all.¹³⁶ A national has no means of obtaining international redress against his or her own state. The only possible redress is that which is available domestically.¹³⁷ However, since World War II, due largely to the many shocking acts committed against large groups of individuals during that war,¹³⁸ the trend has been to create protections for individuals in international law. Many eminent legal scholars have discussed and approved the development of doctrines of individual rights and individual responsibilities in international law.¹³⁹ However, as Jessup noted:

International law may . . . be applicable to certain interrelationships of individuals themselves, where such interrelationships involve matters of international concern. So long, however, as the international community is composed of state, it is only through an exercise of their will, as expressed through treaty or agreement or as laid down by an international authority deriving its power from states, that a rule of law becomes binding upon an individual. . . . The inescapable fact is that the world is today organized on the basis of the coexistence of states, and that fundamental changes will take place only through state action, whether affirmative or negative.¹⁴⁰

Since states are still the true actors in the international arena, any law creating individual rights must be created by the agreement of states. Various human rights declarations have been made within

¹³⁵ *E.g.*, Jessup, *supra* note 66.

¹³⁶ *E.g.*, W. Friedmann, *The Changing Structure of International Law* 234-35 (1964).

¹³⁷ J. Brierly, *The Law of Nations* 291-92 (6th ed. 1963).

¹³⁸ *Id.*

¹³⁹ Friedmann, *supra* note 136, at 234.

¹⁴⁰ Jessup, *supra* note 66, at 17.

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the international community.¹⁴¹ Most of these agreements, however, provide no means of international enforcement, such as a court, although some national courts have attempted to enforce the provisions of human rights declarations.¹⁴² However, two treaties have entered into force which provide both for individual rights and an international forum in which an individual may vindicate his rights. These two conventions are the treaty establishing the European Economic Community, the Treaty of Rome,¹⁴³ and the European Human Rights Convention.¹⁴⁴

A. THE INDIVIDUAL IN THE EUROPEAN COMMUNITIES

The members¹⁴⁵ of the European Communities entered into the Treaty of Rome to "promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it."¹⁴⁶ To implement these goals and purposes, the treaty contains provisions for the elimination of customs duties between member states,¹⁴⁷ the establishment of a common customs tariff¹⁴⁸ and commercial policy¹⁴⁹ towards third countries,¹⁵⁰ the abolition of obstacles of freedom of movement for persons,¹⁵¹ services,¹⁵² and capital¹⁵³ between member states, and various others designed to promote economic integration throughout the European countries. To effectuate these purposes, the Treaty of Rome provides for a Council, consisting of the foreign ministers of the various member states,¹⁵⁴ a

¹⁴¹*E.g.*, Universal Declaration of Human Rights, G.A. Res. 217A(III), G.A. Off. Rec., 3d Session, P. 71 (Dec. 10, 1948).

¹⁴²*E.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

¹⁴³Treaty of Rome.

¹⁴⁴The European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 222 [hereinafter cited as European Human Rights Convention].

¹⁴⁵Member states are Belgium, Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, Denmark, Ireland, Norway, and the United Kingdom.

¹⁴⁶Treaty of Rome, Preamble.

¹⁴⁷*Id.* at arts. 3(a), 12-17.

¹⁴⁸*Id.* at arts. 3(b), 18-29.

¹⁴⁹*Id.* arts. 3(b), 110-16.

¹⁵⁰*Id.* at arts. 3(c), 48-51.

¹⁵¹*Id.* at art. 3(c), 59-66.

¹⁵²*Id.* at art. 3(c), 67-73.

¹⁵³*See, e.g.*, arts. 38-47. (provisions for a common agricultural policy) arts. 74-84 (transport).

¹⁵⁴European Community Information Service, European Community: The Facts 4 (1974).

Commission, an international organization intended to implement the Treaty provisions by promulgating regulations and by resolving disputes,¹⁵⁵ the European Parliament, a popular elected advisory body to the other organs of the Community,¹⁵⁶ and the European Court of Justice, to resolve disputes and interpret the provisions of the Treaty.¹⁵⁷ Any natural or legal person may institute proceedings before the European Court of Justice.¹⁵⁸ An early case in the Court of Justice held that individuals could be proper plaintiffs before the Court because the Treaty of Rome was intended to create individual rights of action.¹⁵⁹ The rights which may be enforced by individuals are primarily of an economic nature. Under the Treaty, workers may move freely from one member state to another for the purpose of employment in the other member state.¹⁶⁰ There is likewise a right of establishment¹⁶¹ in another member state.¹⁶² Individuals have the right to provide services across national borders in other member states,¹⁶³ subject to local regulations¹⁶⁴ and limitations on providing professional services applicable to nationals of that state.¹⁶⁵

B. EUROPEAN HUMAN RIGHTS CONVENTION

The parties¹⁶⁶ to the European Convention on Human Rights of 1950¹⁶⁷ acknowledged in the Convention various individual rights and freedoms. These rights involve the protection of life, respect for

¹⁵⁵Commission of the European Community, *The European Community: Facts and Figures* 7, 10 (1974).

¹⁵⁶*Id.* at 8.

¹⁵⁷Office for Official Publications of the European Communities, *The Court of Justice of the European Communities* 5-7 (1975).

¹⁵⁸Treaty of Rome, art. 173.

¹⁵⁹*Van Gend & Loos v. Netherlands Fiscal Administration*, Court of Justice of the European Communities Case No. 26/62, Feb. 5, 1963, CCH Comm. Mkt. Rep. 8008.

¹⁶⁰Treaty of Rome, arts. 48-51.

¹⁶¹"Freedom of establishment shall include the right to pursue activities as self employed persons and to set up and manage undertakings, in particular companies or firms . . . under the conditions laid down for its own nationals by the law of the country. . . ." *Id.* at art. 52.

¹⁶²*Reyners v. Belgian State*, Court of Justice of the European Communities, Case No. 21/74, June 21, 1974. Reports of Cases before the Court, 1974-75, at 631 CCH Comm. Mkt. Rep. 8256 (1974).

¹⁶³*Van Binsbergen v. Bestuur*, Court of Justice of the European Communities, Case No. 33/74, Dec. 3, 1974. Reports of Cases before the Court, 1974-75, at 1299, CCH Comm. Mkt. Rep. 8282 (1975).

¹⁶⁴Treaty of Rome, art. 60(3).

¹⁶⁵Recent Decision, 7 Ga. J. Int'l & Comp. L. 723-33 (1977).

¹⁶⁶Parties to the European Human Rights Convention are Austria, Belgium, Cyprus, Denmark, the Federal Republic of Germany, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Sweden, Turkey and the United Kingdom.

¹⁶⁷See note 144 *supra*.

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the human being, and both physical and spiritual personal freedom.¹⁶⁸ Limited protection of the right to own property is provided.¹⁶⁹ Included in these rights are the right to life¹⁷⁰ and a prohibition against torture,¹⁷¹ a prohibition against slavery and forced compulsory labor,¹⁷² the right of liberty of person governing arrest and detention,¹⁷³ a right to a fair hearing in criminal proceedings,¹⁷⁴ and protections for private life and correspondence,¹⁷⁵ marriage,¹⁷⁶ freedom of religion,¹⁷⁷ freedom of expression,¹⁷⁸ and freedom of assembly and association.¹⁷⁹ The convention specifically created an individual right of petition and redress.¹⁸⁰ The Convention is unique in international law in that it provided not only for international redress of violations committed by a state against an alien but also for individual redress under the convention and an international forum for violations committed by a state against its own nationals.¹⁸¹ The Convention established a Commission which investigates and in most cases resolves complaints against member states.¹⁸² The Convention also established the European Court of Human Rights,¹⁸³ which hears the rules upon those cases certified to it by the Commission or a contracting party.¹⁸⁴ While an individual may seek redress under the convention from the Commission and the Court, the Convention requires that any remedies available under the domestic law of the state be exhausted before bringing the matter to the Commission.¹⁸⁵ There is no requirement that the aggrieved individual or

¹⁶⁸F. Castberg, *The European Convention on Human Rights* 5-6 (T. Opsahl & T. Ouchterlony ed. 1974).

¹⁶⁹European Convention on Human Rights, Protocol I, art. 1.

¹⁷⁰*Id.* at art. 2.

¹⁷¹*Id.* at art. 3.

¹⁷²*Id.* at art. 4.

¹⁷³*Id.* at art. 5.

¹⁷⁴*Id.* at art. 6.

¹⁷⁵*Id.* at art. 8.

¹⁷⁶*Id.* at art. 12.

¹⁷⁷*Id.* at art. 9.

¹⁷⁸*Id.* at art. 10.

¹⁷⁹*Id.* at art. 11.

¹⁸⁰*Id.* at art. 25.

¹⁸¹Castberg, *supra* note 168, at 1.

¹⁸²*Id.* at 14-15.

¹⁸³*Id.* at 16-17.

¹⁸⁴Individuals do not have direct access to the Court; the Court may hear only those cases brought to it by the Commission or a Contracting Party. European Convention on Human Rights arts. 44, 47.

¹⁸⁵*Id.* at art. 26; Castberg, *supra* note 168, 40-48.

group¹⁸⁶ be a national of a state party to the Convention.¹⁸⁷

A pattern of what is required to establish individual rights which may be enforced internationally emerges from these two treaties. States must consent to establishing international rights for the individual. If states do not so consent, then, under the principle of sovereignty, they are not bound to observe such rights.¹⁸⁸ The agreement between the states, *i.e.*, the treaty, must clearly show that it is intended to deal with individuals, rather than solely with interstate relations.¹⁸⁹ The treaty must describe the rights which the states are agreeing to give to individuals¹⁹⁰ and establish some sort of international agency empowered to interpret and apply the treaty provisions.¹⁹¹ The states must agree either expressly or impliedly, to comply with the decisions of the agency.¹⁹² Lastly, the individual must have direct access to the agency rather than being required to go through his or her government's diplomatic channels.¹⁹³

The last two sections have described individual status and individual rights in general international law. This article will now consider the specifics of individual status under the SOFA and Supplementary Agreement.

V. INDIVIDUAL STATUS IN THEORY AND IN PRACTICE IN GERMANY

A. MILITARY PERSONNEL

"[F]orce" means the personnel belonging to the land, sea or air armed services of one Contracting Party when in the

¹⁸⁶Aggrieved groups may petition for redress under the Convention as well, *e.g.*, *Liberal Party v. United Kingdom*, 4 Eur. Human Rights Reports 106, 129 (Eur. Comm'n on Human Rights 1980).

¹⁸⁷*E.g.*, *Sargin v. Federal Republic of Germany*, 4 Eur. Human Rights Reports 276 (Eur. Comm'n on Human Rights 1981) (Interrogation and search of Turkish nationals).

¹⁸⁸While numerous writers have decried the concept of unchecked sovereignty, *e.g.*, Brierly, *supra* note 137 at 4549; Jessup, *supra* note 66, at 12-13, the international community does not at this time recognize any body of law dealing with individual rights as having become customary international law.

¹⁸⁹*See* notes 158-159, 162, 168, 180, 181 *supra*.

¹⁹⁰*See* notes 160, 161, 163, 169-179 *supra*.

¹⁹¹*See* notes 155, 157, 182, 183-184 *supra*.

¹⁹²As opposed to the agency having a purely advisory role, *see* U.N. Charter arts. 9-14, establishing the General Assembly and its functions.

¹⁹³*See* notes 158, 184 *supra*.

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territory of another Contracting Party in the North Atlantic Treaty area in connexion with their official duties, provided that the two Contracting Parties concerned may agree that certain individuals, units or formations shall not be regarded as constituting or included in a "force" for the purposes of the present Agreement.¹⁹⁴

1. *Assigned Personnel.*

Under the NATO SOFA, "force" is a collective term referring to personnel rather than to military units or formations, such as divisions, corps, or support units. The phrase "belonging to land, sea or air services" is intended to give the widest possible latitude in determining who qualifies as being a part of a force. Each sending state determines who is part of their military force under the sending state's domestic law.¹⁹⁵ The definitions found in domestic law may vary considerably from one sending state to another. Consequently, the broad language used in the SOFA is intended to include all possible individuals who might qualify as a military person under their sending state's laws. This broad concept of belonging to the armed services means that, in practice, military personnel might qualify as belonging to the armed service of a contracting party when in fact they are from a third country not party to the SOFA, but who, because of the relationship between their home state and a Contracting Party, are assimilated into the forces of the Contracting Party. An example is the case of Australian military serving with the British forces. Under the United Kingdom's domestic legislation,¹⁹⁶ such Australian troops are considered a part of the British army and are therefore entitled to all SOFA privileges in Germany. However, members of the forces of countries not parties the NATO SOFA do not become assimilated to the forces of a Contracting Party merely because they are visiting or training with the forces of a Contracting Party. The relationship must be that the third country military personnel become an integral part of the forces of the contracting state before they will be entitled to full SOFA treatment.¹⁹⁷

¹⁹⁴NATO SOFA, art. I(1)(a).

¹⁹⁵See Lazareff *supra* note 4, at 76-79.

¹⁹⁶Visiting Forces (British Commonwealth) Act 1933, 23 & 24 Geo. 5, ch. 6, § 4. See also 29 Halsbury's Law of England 912 (3d ed. 1968).

¹⁹⁷Some foreign military personnel from states not party to SOFA train with the U.S. forces in Germany, but they are not regarded as being assimilated into the U.S. forces. While they are not members of the force under SOFA, the U.S. forces are permitted to furnish them limited subsistence support. U.S. Army Europe, Reg. No. 600-700, Individual Logistic Support, Annex X (9 Aug. 76). [hereinafter cited as USAREUR Reg. 600-700.]

An earlier draft of the SOFA defined the force as “the personnel belonging to the land, sea or air armed forces of one contracting party when in the territory of another contracting party in connection with the operation of the North Atlantic Treaty.”¹⁹⁸ The United States delegate objected to this language because it was thought that it would frequently be difficult to determine whether or not personnel were in a country in connection with the operation of the Treaty. Under this view, it would be possible for military personnel to come to Europe for an official purpose, such as an inspection or other internal administrative matter, which would not clearly be connected with the operation of the North Atlantic Treaty.¹⁹⁹ “In the North Atlantic Treaty area” was suggested as a substitute for the words “in connection with the operation of the North Atlantic Treaty.” The Belgian representative objected to this wording because it would include Dutch troops maneuvering in Belgium although they had no connection with the operation of the NATO treaty.²⁰⁰ The Danish representative also objected, stating that the new wording would extend the coverage to persons in other NATO countries solely on leave.²⁰¹ Therefore, the wording “in the territory another contracting party in the North Atlantic Treaty area in connexion with their official duties” was adopted to accommodate those persons who were not abroad in direct fulfillment of treaty obligations but who were present in the receiving state for some official purpose connected with the administration of the force or the military unit assigned to that receiving state. This definition excluded military personnel of a sending state who were merely traveling abroad for private purposes such as leave or private business, or who were absent without leave. The clause, “provided that . . . not be regarded as . . . ‘force’ ” makes it possible for the contracting parties to exclude from SOFA coverage individuals or military units sent by the sending state to the receiving state for some purpose other than the carrying out of the North Atlantic Treaty obligations.²⁰²

An individual service member is a member of the force in the receiving state if ordered to perform duties in that state or if merely

¹⁹⁸Negotiating History of the NATO SOFA, D-D (51) 57, art. I(a).

¹⁹⁹*Id.* at MS-R (51) 13, para. 4; Snee & Pye, *supra* note 35, at 12. But see Lazareff, *supra* note 4, at 80.

²⁰⁰Negotiating History of the NATO SOFA, MS-R (51) 13, para. 5; Lazareff, *supra* note 4, at 80.

²⁰¹Negotiating History of the NATO SOFA, MS-R (51) 13, para. 7; Snee & Pye, *supra* note 35, at 12.

²⁰²*See* Supplementary Agreement, Protocol of Signature art. I, para. 2 (excludes service attaches and other military personnel with diplomatic status in the Federal Republic from having SOFA status).

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travelling through that state in performance of an official duty. While the earlier Brussels treaty²⁰³ made a distinction between personnel on permanent and temporary duty in a receiving state,²⁰⁴ this was eliminated from consideration for the SOFA quite early on.²⁰⁵ Indeed, making this distinction would conflict with some of the fundamental assumptions of NATO forces stationing. Military personnel assigned to forces stationed in receiving states are always viewed as being temporarily present in the receiving state's territory. They are not treated as being residents of the receiving state's territory for taxation purposes.²⁰⁶ Additionally, time spent in fulfillment or a military obligation does not count toward establishing residence or domicile in a receiving state²⁰⁷ and such personnel are specifically considered not to be residents of the territory during the time they are present in the fulfillment of military duties.²⁰⁸ Thus all persons having status under the SOFA, military, civilian component, and dependents, are viewed as being temporarily present in the territory of the receiving state, even though some may be there for three, four, or more years while others may be in the territory for only a few days or hours.

2. *Personnel on leave.*

Military personnel who are in the territory of another NATO state while on leave are not entitled to SOFA treatment in the state they are visiting, but are rather normally in the same position as a private American citizen traveling in that country. This fact frequently surprises many American service members and administrators overseas. Many have the erroneous impression that, because they are a member of the force in Germany, they are also a member of the force in other NATO countries.²⁰⁹ By not being a member of the force in the NATO country being visited, the service member is not entitled to the criminal jurisdictional protections of the SOFA, may not make purchases from U.S. sales facilities in that country, and is subject to all taxes and alien registration requirements that the particular country may impose upon visiting aliens. Frequently, these problems have been diminished by accommodations reached

²⁰³Agreement Relative to the Status of Members of the Armed Forces of the Brussels Treaty Powers, December 21, 1949 (Cmd. 7868). See Department of State, 22 Bulletin 449-53 (1950).

²⁰⁴Snee & Pye, *supra* note 35, at 11.

²⁰⁵Negotiating History of the NATO SOFA, MS-R (51)3, para. 8.

²⁰⁶NATO SOFA, art. X(1).

²⁰⁷*Id.* at art. III(1).

²⁰⁸See Supplementary Agreement, art. 7.

²⁰⁹Lazareff, *supra* note 4, at 80.

between the U.S. forces and the authorities of the other state, thereby reducing the burden upon the American service member traveling on leave. France, for instance, will treat any service member traveling in France as a member of the force assigned to France provided the service member has a bilingual travel order in his or her possession and is in France with the permission of the U.S. forces.²¹⁰ This applies even though the service member is assigned to Germany or another state and is in France purely for the purpose of leave. The Federal Republic of Germany has entered into an agreement²¹¹ allowing military personnel not assigned in the Federal Republic but who are there on leave status to receive most of the benefits given members of the force stationed in the Federal Republic; but this agreement does not make them members of the force under the SOFA itself. In northern Germany, several installations are so close to the Dutch border that many personnel live in the Netherlands and commute to their duty assignment in Germany. While normally these persons would have no particular status other than that of an alien in the Netherlands and would therefore be subject to all taxes, registration requirements, and other restrictions placed on aliens, the Dutch government has granted these service members commuters privileges similar to that granted personnel who are members of the force in the Netherlands.²¹² Members of the force who are on leave within the territory of the state to which they are assigned continue to be members of the force in that territory.²¹³

3. *Reserve personnel.*

A problem area concerning who qualifies as a member of the force is the situation involving an individual who lives abroad in a NATO country and is employed by a private employer, but who is also a member of a U.S. reserve unit and performs reserve training with the U.S. forces in that NATO country. Clearly, the reservist is not a member of the force at all times, since he or she is not present in that country in connection with official duties, but rather because he or she lives and works in the private sector. However, when ordered to join a U.S. unit stationed in the host state to fulfill an active duty military obligation, the reservist becomes a member of the force in

²¹⁰See U.S. Army Europe. Reg. No. 550-80, Clearance and Documentation for Duty and Leave Travel, Annex B, para. 16 (C3, 13 Apr. 77).

²¹¹Agreement between the Federal Republic of Germany and the United States of America on the Status of Personson Leave, August 3, 1959, 14 U.S.T. 689, T.I.A.S. No. 5352, 490 U.N.T.S. 30 [hereinafter cited as Agreement on Status of Personson Leave].

²¹²Decree of Dutch Ministry of Finance, July 30, 1980; DF CMT1, AEAJA-IA, subject: NORTHAG Border Crossings, 5 Dec. 1980.

²¹³Snee & Pye, *supra* note 35, at 11.

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that country for the period of time served on active duty.²¹⁴ During this period of active duty, he or she is entitled to all the privileges afforded to members of the force, such as access to sales facilities,²¹⁵ tax exemption for military pay, and use of U.S. forces recreational facilities, and is subject to concurrent U.S. criminal jurisdiction.²¹⁶ At other times, the reservist participates in inactive duty training for which he or she receives military pay and retirement points.²¹⁷ The position of U.S. Army, Europe, has been that a reservist does not become a member of the force for the period that he or she performs his inactive duty training, because, under the orders given for inactive duty training, a reservist is not compelled to go to a particular duty position or site within a NATO country, but rather goes and performs the training at any site where the training is offered.²¹⁸ He or she is not compelled by criminal sanctions to go to that duty; if the reservist misses an active duty training session, he or she is rarely dropped from the reserve program and may not be criminally prosecuted for the failure to attend the reserve meetings.²¹⁹ In any event, it would be difficult to justify to the host country authorities granting SOFA status for such a brief period to an individual who normally has all of his or her private and business dealings within the host nation society as a resident.

4. *Retirees.*

Retirees constitute another group which, because of their connection with the armed services, have possible claim to being considered members of the force, and therefore entitled to SOFA privileges. Two reasons are generally advanced for considering retirees as members of the force. The first is that retirees are granted various privileges,²²⁰ such as use of military sales facilities, as part of their retirement benefits and have a right to enjoy these benefits even though they are living in a foreign country. However, if they do not have status under the SOFA, they may be precluded from exercising these rights. A second and stronger argument for treating them as

²¹⁴DM CMT1, AEAJA-IA, subject: Status of Reservists in Europe, 21 Nov. 1980.

²¹⁵USAREUR Reg. 600-700, Annex C (9 Aug. 76).

²¹⁶NATO SOFA, art. VII.

²¹⁷See 10 U.S.C. §§ 101511(d), 672(b)(d), 683 (1976); 37 U.S.C. §§ 204, 206 (1976).

²¹⁸DF CMT2, AEAJA-IA, subject: Review of Status of Reservists in Europe, 8 Mar. 1982.

²¹⁹See note 214 *supra*.

²²⁰*E.g.*, U.S. Dep't of Army, Reg. No. 60-20, Exchange Service - Exchange Service Operating Procedures, para. 2-9(a)(7) (C1, 15 Feb. 80); U.S. Dep't of Army, Reg. No. 30-19, Food Programs-Army Commissary Store Operating Policies, para. 4-7; App. B, para B-2(d) (C1, 15 Oct. 82).

members of the force is that they are, under U.S. statute and regulation, considered to be members of the armed services and are in fact subject to recall to active duty in the event their services are needed in time of national emergency.²²¹ However, retirees have never been treated as members of the force under the SOFA.²²² Additionally, retirees are not in the territory of a contracting party because of military duties, but because they choose to live and work in the host nation rather than in the United States. Therefore, even if they are members of the armed services of a sending state, they fail the other test of SOFA Article I(a).²²³

Even though they are not members of the force, retirees are not completely precluded from exercising their retirement benefits. Some U.S. forces benefits, such as medical and legal assistance, may be used by the retiree living abroad and are subject only to limitations imposed by the U.S. forces. The benefits which the host country is most likely to object to the retirees exercising are those which involve making tax-free purchases of goods, including rationed items, through U.S. sales facilities. However, frequently, the host nation authorities have, under separate arrangements, permitted retirees to use these facilities as well. For instance, the German Ministry of Finance has for a number of years issued decrees permitting retirees to make purchases at U.S. sales facilities, provided that they pay import duty to the German customs authorities.²²⁴

B. CIVILIAN COMPONENT

"Civilian component" means the civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party who are in the employ of an armed service of that Contracting Party and who are not stateless persons, nor nationals of any State which is not a Party to the North Atlantic Treaty, nor nationals or, nor ordinarily resident in, the State in which the force is located.²²⁵ There are several tests which an individual must meet before he or she can be classified as a member of the civilian component for SOFA purposes. These are the employment tests, the nationality test, and the test of being "not ordinarily resident."

²²¹ 10 U.S.C. §§ 672a, 675, 3504 (1976); U.S. Dep't of Army, Reg. No. 601-10, Personnel Procurement - Mobilization of Retired Members of the Army (15 Feb. 79).

²²² Schubert, *Military Logistic Support of Civilian Personnel Overseas Under Status of Forces Agreements*, 17 Mil. L. Rev. 99, 105, 112 (1962).

²²³ See text accompanying note 197 *supra*.

²²⁴ Decision Paper, AEAJA-IA, subject: NATO SOFA Provision Concerning Payment of Customs Fees for Rationed Items by Retired Persons, 21 Aug. 1981.

²²⁵ NATO SOFA, art. I(1)(b).

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1. *Employment.*

SOFA Article I(1)(b) requires that a civilian component member be in the employ of an armed service of the sending state, rather than being a civilian employee of the government of the sending state. Thus, if a civil servant is sent to a NATO country from an executive branch other than the military departments, that civil servant would be ineligible for any of the individual benefits granted under the SOFA.²²⁶ The civil servant may, depending on the mission and duties, have diplomatic or similar privileges separate and distinct from those granted by the SOFA. Such personnel would not be eligible to use the U.S. sales facilities to make tax-free purchases unless the host government has granted special permission for this privilege.²²⁷

“Accompanying a force of a contracting party” would appear to require that the civil servant be working at a facility used by a force or at least be in a country in which the employing state had a force stationed, but neither are required. The various articles dealing with the treatment of the numbers of a force invariably add “or a civilian component,”²²⁸ thereby making it clear that the civilian component or the members thereof are not required to be located with a part of the force. Article I(1)(e) states that a “receiving state is a territory in which the force or civilian component is located whether it be stationed there or passing in transit.” Note that the civilian component does not include all civilian employees of an armed service located in a receiving state. Many civilian employees are disqualified from being members of a civilian component because they do not meet the tests of nationality or of being “not ordinarily resident” in the receiving state.²²⁹ Likewise, a sending state is not obligated to treat all civilian employees who may meet the test of nationality and being “not ordinarily resident” as members of the civilian component, but may elect to treat some such employees the same as they treat local national employees. However, the use of such person in local national positions would be subject to understandings and agreements with the host government.²³⁰

²²⁶Schubert, *supra* note 222, at 110.

²²⁷However, some categories of nonmilitary personnel, such as diplomatic personnel, are given access to U.S. forces' sales facilities even though not entitled to SOFA status. *E.g.*, USAREUR Reg. 600-700, annex AC (9 Aug. 76). Such extension of privileges are generally the result of separate understandings with the host nation authorities.

²²⁸*E.g.*, NATO SOFA, art. IX (2, 3).

²²⁹Snee & Pye, *supra* note 35, at 19.

²³⁰Lazareff, *supra* note 4, at 88-89.

As is the case with the military member, being a member of the civilian component in one NATO country does not mean that a civilian employee who goes to another NATO country is a member of the civilian component in the second state. The phrase "in the employ of an armed service" in Article I(1)(b) is probably slightly more restrictive than the equivalent phrase in Article I(1)(a), which grants status to military personnel present in another contracting party's territory "in connexion with their official duties"; whether there is a practical difference between the member of the force and the member of the civilian component is debatable. The intent and the practice has been that a civilian component member sent into the territory of another contracting party to perform some task relating to his or her employment, or who transits another NATO country in the course of official duties, is considered to be a member of the civilian component in those countries.²³¹ However, suppose a civilian employee who is a member of the civilian component in Belgium travels to Heidelberg for a week-long series of meetings dealing with transport problems within the European theatre. Such meetings relate to his or her employment in Belgium; he or she would clearly be a member of the civilian component in Germany for the week of meetings, as well as during the travel to and from Heidelberg. But suppose that, after the series of meetings in Heidelberg, he or she spends the following week on leave touring in southern Germany before returning to Belgium. Would he or she be a member of the civilian component in Germany during this week of leave? During the week of leave, the civilian employee is not performing any official duties required by his or her employment in Belgium. The civilian is not in the employ of an armed service in the Federal Republic of Germany. Therefore, under the SOFA, he or she would not be a member of the civilian component in Germany during the week of leave.²³² Contrast the case of the civilian employee from Belgium with a U.S. military member who comes from Belgium to Heidelberg to attend the same meeting and spends a similar week of leave touring southern Germany. A military member remains a part of the force regardless of where in the world he or she is ordered to perform military duties, whereas a civilian employee is employed to do a particular job at a particular location. The military member has entered the Federal Republic "in connexion with his official duty."

²³¹Snee & Pye, *supra* note 35, at 19.

²³²While he or she is not a member of the civilian component in Germany, he or she will nonetheless have some of the privileges of a member of the civilian component in Germany, such as access to U.S. force's sales facilities. Agreement on Status of Persons on Leave.

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Consequently, he or she remains a member of the force in the Federal Republic of Germany until he or she either leaves the Federal Republic or ceases to be a member of the military forces of the United States.²³³

2. Nationality.

Unlike for a member of the force, where the nationality of the member is largely irrelevant,²³⁴ nationality is an important factor for determining whether an individual is part of the civilian component. The French wanted the agreement to require members of the civilian component to be nationals of the sending state and indicated that third country nationals or stateless persons might be excluded from French territory.²³⁵ The United States objected to the French position because some American forces employees were not American citizens and would be left without SOFA protection, even though they were accompanying the U.S. forces.²³⁶ Under the then existing U.S. law, all civilians who were accompanying the U.S. forces outside the United States were subject to military criminal jurisdiction, regardless of nationality.²³⁷ The United States wanted neither to give up its third country national employees nor its criminal jurisdiction over them.²³⁸ The compromise reached was to allow sending states to hire personnel other than their own nationals for their civilian component, provided that such personnel were not stateless persons and were nationals of a party to the North Atlantic Treaty. Thus, a British citizen may be hired by the U.S. forces and given full privileges as a member of the U.S. forces civilian component in Germany or any other contracting state, except the United Kingdom. An interesting result of the language of the test is that an individual need not be a national of a state party to the NATO Status of Forces Agreement²³⁹ or to the Supplementary Agreement²⁴⁰ to be accorded

²³³Lazareff, *supra* note 4, at 80.

²³⁴The nationality of a member of the force is irrelevant unless the member is a national of the receiving state, in which case it may be argued that the member should not receive special privileges in his home land and should be wholly subject to the jurisdiction of the receiving state. Such an interpretation, while legally sound, can reduce considerable hardship for those persons possessing the nationality of both sending and receiving states. Lazareff, *supra* note 4, at 78.

²³⁵Snee & Pye, *supra* note 35, at 15.

²³⁶Schubert, *supra* note 222, at 104-05.

²³⁷Snee & Pye, *supra* note 35, at 15. *But see supra* note 31.

²³⁸Snee & Pye, *supra* note 35, at 15.

²³⁹The Parties to the NATO SOFA are Belgium, Canada, Denmark, France, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, the United Kingdom, the United States, and the Federal Republic of Germany.

²⁴⁰The Parties to the Supplementary Agreement are the Federal Republic of Germany, Belgium, Canada, France, the Netherlands, the United Kingdom, and the United States.

SOFA status as a member of the civilian component of another NATO state, since all states which are parties to the North Atlantic Treaty²⁴¹ are not parties to the SOFA and Supplementary Agreement.²⁴² Nationality of a member of the civilian component is determined under the laws of the state party to the North Atlantic Treaty of which he or she claims to be a national.²⁴³ Normally, the determination of nationality is made by the authorities of the sending states which employ him or her, although those authorities might ask for advice from either the authorities of that nation's forces or from diplomatic or consular personnel of that state. Normally, possession of a passport of the claimed state is considered evidence of being a national of that state, but the passport is neither necessary nor conclusive in proving nationality.²⁴⁴

3. "Not Ordinarily Resident."

The phrase "not ordinarily resident" is by far the thorniest area in determining status under the SOFA. Clearly, the broad policy consideration behind this phrase in the SOFA and other similar international agreements²⁴⁵ is to keep those who have a "special bond"²⁴⁶ with the host country from claiming all the benefits designed to ease military service abroad. One fundamental reason for the various individual privileges under the SOFA and implementing agreements is to ease the burden placed on the individual who is sent overseas to help meet his or her country's obligation under the North Atlantic Treaty. Such overseas service exposes the individual to the difficulties of coping with a new country and with the attendant problems of different languages, customs, laws, and consumer products. The privileges afforded to individuals under the SOFA are designed to alleviate the shock of overseas duty. For those who have chosen for private reasons to reside in the receiving state independent of their nation's forces and who have voluntarily become a part of the host country society, there is no justification for the privileges

²⁴¹The Parties to the North Atlantic Treaty are Belgium, Canada, Denmark, France, Federal Republic of Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Turkey, the United Kingdom, and the United States.

²⁴²According to Lazareff, the use of the phrase limiting members of the civilian component to nationals of North Atlantic Treaty states rather than to states party to the SOFA was to cover the gap between accession to the North Atlantic Treaty and accession to SOFA. Lazareff, *supra* note 4, at 97.

²⁴³While this principle is nowhere clearly stated in the treaties, it follows from the basic principle that nationality is a matter of municipal, rather than international, law. *E.g.*, P. Weis, *Nationality and Statelessness in International Law* 65-70 (1956).

²⁴⁴*Id.* at 255-29.

²⁴⁵*E.g.*, Consular Convention.

²⁴⁶Snee & Pye, *supra* note 35, at 16-17.

²⁴⁷Lazareff, *supra* note 4, at 92-93.

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designed to cushion against the adverse impact of overseas service.²⁴⁷ The NATO Status of Forces Agreement and Supplementary Agreement do not define the term "ordinarily resident." The negotiating histories of the agreements offer no help in reaching a definition. "Ordinarily resident" is a term of art unique to the SOFA which is not equivalent to the legal concept of residence or domicile as these terms are commonly understood in either common or civil law jurisdictions.²⁴⁸

Prior to 1974, "ordinarily resident" determinations were made by various U.S. forces employers based on the indicia of intent commonly found in American legal practice. However, use of the intent standard led to a lack of precision in making the "ordinarily resident" determination.²⁴⁹ To avoid subjective judgments which could be construed as discriminatory or showing favoritism, U.S. Army, Europe, adopted the following definition of "ordinarily resident":

In the Federal Republic of Germany (FRG), a US citizen who has continuously resided in the host country for one year or more without status as a member of the "Force" or "Civilian Component" as defined in the NATO Status of Forces Agreement, or who has obtained a work permit of any duration in the host country. This also applies in other countries unless some other definition of "ordinary (sic) resident" is applied in those countries.²⁵⁰

This rule was intended as guidance for civilian personnel officers in determining whether or not an applicant for employment could properly be classified as a member of the civilian component. However, this definition was never intended to be an exhaustive definition of "ordinarily resident," but was designed as a guide for the initial evaluation of prospective employees.²⁵¹ In the event an applicant fails to qualify as being "not ordinarily resident," it would still be possible for the authorities of the U.S. forces to evaluate the totality of the information concerning the applicant and determine that there was in fact no significant bond between the applicant and the host country, thereby making it possible to conclude that the

²⁴⁸For a useful article on the interpretation of treaties, see Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 27 Brit. Y.B. Int'l L. 1 (1951).

²⁴⁹Memorandum, AEAJA-IA, subject: "Ordinarily Resident" Determinations, 4 Feb. 1983.

²⁵⁰U.S. Army, Europe Supplement 1 to Dept. of Army Civilian Personnel Reg. 300/302-C, para. C-3c.

²⁵¹1st Indorsement, AEAJA-IA, subject: Concept of the "Ordinarily Resident" Provision (Paragraph 16, Article I, NATO SOFA), 2 Mar. 1981.

individual was not in fact "ordinarily resident" and was eligible to become a member of the civilian component. Such deviations from the general rule require close scrutiny of all available facts to determine whether or not a special bond exists between the individual and the host state. In a case where an individual has remained in the host country for more than one year without affiliation with the U.S. forces, the authorities of the force must determine whether or not the available facts, taken as a whole, indicate that the individual's presence in the country was transitory, even though it may have been of a relatively long duration. Factors which tend to indicate the individual's presence was temporary and that there was no special bond with the host country are such indicia as the individual being a full-time student during the time in the host country,²⁵² whether or not the individual had income from sources within the host country or was financially dependent on sources outside the host country or from persons having status under the agreements, and whether or not the individual was employed on the local economy; although employment that was obviously temporary, such as intermittent day labor or a job for a short period of clearly defined time would probably be insufficient to establish a special bond with the host country. Probably, no special bond with the host country would exist if the individual had no fixed abode, but moved about as a tourist during his extended stay. Repeated attempts to obtain employment from the U.S. forces during the period of the stay would also indicate lack of special bond with the host country.²⁵³ Possession of a work permit would normally indicate the intent to obtain a local job and remain in the host country which, in turn, would indicate the existence of a special bond.²⁵⁴ However, such a conclusion would not necessarily follow if the work permit were obtained because it was erroneously believed it was necessary for employment with the U.S. forces, or if it were obtained and used only briefly while awaiting employment with the U.S. forces. On the other hand, an individual who had remained in the host country for more than one year and who was disqualified under the general rule would likely not be able to show a lack of special bond with the host country if he or she had clearly established personal ties to the host country, such as marriage to a host country national or ownership of a home in the receiving state, or extensive business or investment interests in the host nation economy.

²⁵²DM CMT1, AEAJA-IA. subject: Application for USAREUR Privilege Authorization Card. 23 Sept. 1981.

²⁵³Memorandum, *supra* note 249, at 7.

²⁵⁴See note 250 and accompanying text *supra*.

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C. EMPLOYEES OF NON-GERMAN, NONCOMMERCIAL ORGANIZATIONS

Article 71 of the Supplementary Agreement with the Federal Republic of Germany provides for treating specifically recognized non-German, noncommercial activities in essentially the same manner as a force or civilian component is treated. These non-German, noncommercial organizations are various social and educational nonprofit groups, such as the Red Cross and universities providing instruction for personnel having status under the SOFA and Supplementary Agreement.²⁵⁵ Some British and Canadian organizations in this category are considered to be and are treated as integral parts of the force.²⁵⁶ Most noncommercial organizations are not considered integral parts of the force, but enjoy the benefits and exemptions accorded to the force by the SOFA and Supplementary Agreement to the extent necessary to fulfill their agreed-upon purposes.²⁵⁷ They may not procure goods or services directly either abroad or locally, but must do their procurement through the sending state authorities.²⁵⁸ These noncommercial organizations are exempt from German regulations governing trade and business activities, but are subject to German safety regulations.²⁵⁹ An important aspect of Article 71 organizations is that the organizations are not required by the term of the article to exclusively serve the force or the civilian component.

Employees of such organizations are considered to be and are treated as members of a civilian component.²⁶⁰ As is the case with persons who are members of the civilian component under the terms of Article I of the SOFA, such as employees of an armed service, employees of an Article 71 organization may not be stateless persons, nationals of a state not party to the North Atlantic Treaty, German nationals, or persons ordinarily resident in the Federal territory.²⁶¹ Additionally, these employees must be exclusively serving the non-German, noncommercial organizations.²⁶² This requirement of exclusive service is not, strictly speaking, required of either

²⁵⁵Art. 71, Protocol of Signature, para. 3. Various other organizations, mostly colleges and universities, have been assimilated into Article 71 status by agreement between the sending state authorities and the host nation authorities.

²⁵⁶*Id.* at para. 2.

²⁵⁷Supplementary Agreement, art. 71(2).

²⁵⁸*Id.* at art. 71(2)(9).

²⁵⁹*Id.* at art. 71(3).

²⁶⁰*Id.* at art. 71(5).

²⁶¹*Id.* at art. 71(6).

²⁶²*Id.* at art. 71(5)(a).

members of the force or civilian component personnel who are government employees. This requirement of exclusive service frequently creates problems for the various universities which are noncommercial organizations in that they frequently hire instructors on a temporary basis to teach one course in a given semester, rather than hiring the instructors on a permanent basis. An instructor who has no continuing employment, but who contracts on a course by course basis, is no longer employed by the university when his or her contract is completed and thereby loses his or her eligibility for treatment as a member of the civilian component.²⁶³ Should the instructor remain in the receiving state for any period of time without SOFA status, he or she runs the risk of becoming "ordinarily resident" in that country and therefore not be eligible for civilian component privileges if rehired. This would not be true if the instructor resided in the receiving state only during the period that he or she was employed by the college or university and then left the country to go to the United States or some other country while not employed by the college or university.

One difference between employees granted civilian component status under Article 71 and those granted such status by Article I of the NATO SOFA or by Articles 72 or 73 of the Supplementary Agreement is that employees under Article 71 do not enjoy the general exemption from taxation on their salaries granted to other civilian component personnel.²⁶⁴ They are exempt from taxation on their salaries paid to them by the noncommercial organizations, but only if such salaries are either liable to taxation in the sending state or the salaries are computed under the assumption that no tax liability will arise.²⁶⁵ This formulation may produce problems for both the organization and the employee, depending on the nationality of the employee. A U.S. citizen or resident alien is liable to assessment for taxation under the U.S. Internal Revenue Code.²⁶⁶ However, a British employee of a U.S. non-German, noncommercial organization is

²⁶³These instructors are probably not employees of the college or university at all, but are more of the nature of independent contractors. They contract to teach a specific course which the college or university does not supervise, but rather gives a very general specification as to how the course is to be taught and graded. The instructor is only paid when the course and administrative matters are completed. The instructor has no right to any contract to teach any subsequent courses. Granting such persons status equivalent to members of the civilian component is at best dubious.

²⁶⁴NATO SOFA, art. X.

²⁶⁵Supplementary Agreement, art. 71(5)(a).

²⁶⁶Internal Revenue Code § 61(a).

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not liable for tax under the United Kingdom's income tax laws.²⁶⁷ If both the Briton and the American employees were paid the same salary for essentially the same duties, it would be difficult to argue that the Briton's pay was computed on the assumption that no tax liability would arise. Therefore the employee and his or her employer would have to cope with his tax liability to the Federal Republic of Germany.

D. EMPLOYEES OF NON-GERMAN COMMERCIAL ENTERPRISES

Article 72 of the Supplementary Agreement with the Federal Republic of Germany allows specified commercial firms to establish themselves in the territory of the Federal Republic and transact their business with the forces and the members of the force, civilian component and their dependents, without being subject to German regulation of their right of establishment.²⁶⁸ These commercial entities are exempt from customs, taxes, import, and re-export restrictions, foreign exchange control, and from German regulation governing the conduct of trade and business activity.²⁶⁹ However, this broad range of privileges applies only if the commercial enterprise exclusively serves the force, civilian component, and their members and dependents.²⁷⁰ When, as the case with such organizations as American Express and Chase Manhattan Bank, the parent company has other dealings in Germany not associated with the military, Article 72 requires that there be a clear legal or administrative separation between those activities which are performed exclusively for the force and those which are not.²⁷¹ A further requirement imposed is that the activities of such companies be restricted to business transactions which cannot be undertaken by Germany enterprises without prejudice to the military requirements of the force.²⁷²

An employee of such an organization is "granted the same exemptions and benefits as is granted to members of the civilian component."²⁷³ As is the case with all persons considered part of the civilian

²⁶⁷Income and Corporation Taxes Act, 1970, § 108(1)(ii) (U.K.). See also 33 Halsbury's Laws of England 7-8 (3d ed. 1968).

²⁶⁸Compare with notes 161, 162 & accompanying text *supra* on the right of establishment in the European Communities.

²⁶⁹Supplementary Agreement, art. 72(1)(a)(b).

²⁷⁰*Id.* at art. 72(2)(9).

²⁷¹*Id.* at art. 72(3).

²⁷²*Id.* at art. 72(2)(b).

²⁷³*Id.* at art. 72(5)(a).

component, an employee of the commercial enterprise may not be a stateless person, a national of a state not party to the North Atlantic Treaty, a German national, or a person "ordinarily resident" in the Federal Republic.²⁷⁴ As with the case of employees of Article 71 organizations, the employees of commercial organizations must exclusively serve such enterprises and may not have outside employment on the German economy.²⁷⁵ The sending state authorities may restrict the exemptions and benefits extended to these enterprises or their employees and must inform the German authorities should they do so.²⁷⁶

E. TECHNICAL EXPERTS

Technical experts are neither government employees nor employees of any organizations granted particular status under the Supplementary Agreement. They are generally, although not always, employees of firms supplying equipment or technical services to the military. Article 73 provides that they shall be considered to be and treated as members of the civilian component. They too may not be stateless persons, nationals of a state not party to the North Atlantic Treaty, German nationals, or persons "ordinarily resident" in the Federal Republic of Germany.²⁷⁷ While employees of Articles 71 and 72 organizations are required to exclusively serve those organizations in order to qualify for civilian component status, technical experts are required to exclusively serve the force which retains their services. SOFA and Supplementary Agreement privileges and exemptions are granted to the individual technical expert; they are not granted to the employing company or organization. Thus, while the technical expert may import his or her private goods into the country duty-free, and re-export them as well, the employing company may not import or export equipment or supplies directly unless they comply fully with host country law. If the employing company wishes to be exempt from Germany controls over the import and export of their equipment, they must put that equipment in the possession of the military force for shipment rather than shipping it directly by the company.

²⁷⁴*Id.* at art. 72(5)(b).

²⁷⁵*Id.* at art. 72(5)(a).

²⁷⁶*Id.* at art. 72(5)(a),(6).

²⁷⁷Technical experts are not restricted to activities directly supporting the military mission. Warranty repair representatives, employed by U.S. auto makers who sell American cars through the Army and Air Force Exchange System, Europe have been treated as technical experts. DF CMT2, AEAJA-IA, subject: Individual Logistic Support for Army and Air Force Exchange System (AAFES), Europe New Car Contractor Personnel. 13 Aug. 1980.

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“Technical expert” is not precisely defined, but Article 73 indicates that such experts should be “in an advisory capacity in technical matters or be employed in setting up, operating or maintaining equipment for the force.” “Technical expert” includes such personnel as computer programmers or computer maintenance personnel, engineers and engineering consultants, social scientists doing contract research, and those maintaining and operating sophisticated electronic equipment. The term would likewise clearly exclude support personnel such as secretaries, clerks and the like. Where, however, the line is drawn between a “technical expert” who qualifies as a member of the civilian component and other personnel of the same company who do not qualify is unclear. Clearly, the object is to restrict technical expert status to those possessing skills needed by the force which are not available either from military or government civilian personnel and which could not be obtained from sources available within the German economy. Article 73 provides that “technical experts” must exclusively serve the force while in the territory of the Federal Republic. Thus, they may not engage in any activities on behalf of their company that are not related to the forces, even though their company may have an extensive presence within Germany in a nonmilitary field.

F. DEPENDENTS

“Dependent” means the spouse of a member of a force or of a civilian component, or a child of such member depending on him or her for support.²⁷⁸ Dependents differ from members of the force and civilian component in that their presence in the receiving state is neither “in connection with official duties nor because they are in the employ of an armed service. Their presence in the host country and their having status under the SOFA results from their relationship to a member of the force or the civilian component. This derivative relationship, at least arguably, gives rise to SOFA status by operation of law rather than by action of the sending state. The motivation for giving dependents status under the agreements is the same as with similar provisions in other treaties:²⁷⁹ to allow persons in foreign service to have their immediate family members with them abroad as well as to make foreign service easier upon both the officials and their families. Allowing the family members privileges under the agreement makes the administrative burden of accounting and caring for the dependents less onerous on the government

²⁷⁸NATO SOFA, art. I(1)(c).

²⁷⁹*E.g.*, Diplomatic Convention, art. 37; Consular Convention, arts. 49, 50.

agency.²⁸⁰ Therefore, the dependent provision in the SOFA are not designed to confer individual rights on the spouses or children of members of the force or civilian component, but instead granted solely because these privileges benefit the military forces sent abroad.

1. *Spouses.*

A "spouse" is anyone recognized by the laws of the sending state as being the husband or wife of a member of the force or of the civilian component. A spouse may be of any nationality, including a state not party to the North Atlantic Treaty, or may be a stateless person and still benefit from status under the SOFA. A spouse may also be a national of the receiving state and receive all the benefits that accrue to a spouse of other nationalities. Under early SOFA practice, a husband was required to be financially dependent on his wife to be accorded dependent status;²⁸¹ this is no longer the case. A spouse does not have to be dependent for support to qualify as a dependent under the SOFA. American practice has been to recognize, for the purposes of the SOFA, the husband or wife of a member of the military or of a civilian component even though the U.S. forces did not bring that spouse to the receiving state at government expense. Thus, should the spouse of a service member or civilian component travel abroad to join a member of the force or of the civilian component at their own expense, the spouse will still be accorded SOFA privileges and treatment. This policy of recognizing spouses which the government as not officially sent abroad sometimes creates a problem with the spouse who is in the host state, but whose presence is not desired by the authorities of the force.

Occasionally a dependent husband or wife will engage in some sort of criminal conduct, such as selling drugs, petty theft, or prostitution, but, due to the relatively minor nature of the offense, the host nation authorities agree to not prosecute provided the U.S. authorities send the offender out of the country. In other cases, the spouse will commit offenses solely against U.S. forces' interests, such as shoplifting from sales facilities, and the U.S. forces authorities will be unable to convince the receiving state authorities to prosecute the offense. In such a situation, the U.S. forces will frequently return the offender to the United States to preclude further misconduct. The returned spouse will sometimes merely obtain a tourist passport and

²⁸⁰See G. Draper, *Civilians and the NATO Status of Forces Agreement* 26-28 (1966).

²⁸¹Schubert, *supra* note 222, at 111.

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board another flight back to the receiving state so that he or she can be reunited with the family and continue to engage in criminal activity. Clearly, affording such an individual the privileges, benefits, and protections of the SOFA is not in the best interest of either the sending state or the receiving state. The sending state authorities have already determined that this person is either an embarrassment to the U.S. forces, or that his or her presence is prejudicial to good order and discipline, or both. While the receiving state may issue an expulsion order against a dependent,²⁸² such orders as a practical matter would normally be issued, if at all, only after coordination with U.S. forces authorities.²⁸³ Frequently, the host nation authorities will have little or no interest in going through the expulsion procedure for an undesirable dependent if that dependent has done nothing of a criminal nature which would impact on the host country community, but rather who has confined all of his or her illegal or undesirable acts to the U.S. community. Additionally, due to provisions exempting members of the force and of the civilian component and their dependents from host country alien registration requirements,²⁸⁴ undesired dependents may well be permitted to remain in the host country for a considerable period of time where, were they treated as mere alien visitors, they would be required to obtain a residence permit. Generally it would be easier for the host nation authorities to refuse to issue a residence permit and then require the dependent to leave than to issue an expulsion order based on misconduct. The question is therefore whether the U.S. forces must extend dependent status to the undesirable spouse or whether the sending state forces have the power to deny dependent status under the treaty.

The entire basis of SOFA status is that the persons given that status are sent by the sending state to the territory of the receiving state in fulfillment of the NATO commitment. As with the case of diplomatic and consular personnel, personnel granted status under SOFA receive their special benefits, protections, and privileges solely because they are acting in the interest of their sending state. Dependents are granted status derivatively because allowing those with an official mission overseas to take their dependents with them

²⁸²NATO SOFA, art. III(5).

²⁸³Supplementary Agreement, art. 8(1) requires the German authorities to consult with the sending states authorities before issuing an expulsion order against a dependent. German authorities must consider that the continued presence of the person in the Federal Republic "actually endangered public order or public security" before issuing such an order. Art. 8(3).

²⁸⁴*Id.* at art. 6.

benefits the morale and family unit of the governmental agents, thereby enhancing their mission performance. No individual rights are created by either the terms of the SOFA or by the definitions found in the Diplomatic Convention or the Consular Convention. Therefore, it should be possible for the sending state to deny dependent status under SOFA to one who might otherwise be able to claim it. However, because the host nation would normally have the right to presume that an otherwise qualified dependent would in fact be considered a dependent of a member of the force or civilian component by the sending state, it would be necessary for the sending state authorities to notify the appropriate host nation authorities that a given individual was not considered a dependent by these sending state authorities. In cases where the dependent was transported to the receiving state at government expense, the sending state would have to attempt to remove the person from the territory of the receiving state.²⁸⁵ In other cases, the denial of status would shift the burden of dealing with the unwanted dependent to the host government. Denial of dependency status under the SOFA would not alter the person's eligibility under U.S. statutory provisions for the dependents of service members. However, if the exercise of a statutory right in the receiving state was contingent upon the individual having status under the SOFA, it would be possible for the authorities of the U.S. forces to effectively deny those rights by declaring an individual to not be recognized as a dependent under the SOFA.

2. *Children.*

"Child" is not limited to legitimate children, but may include any acknowledged child of a service member or member of the civilian component.²⁸⁶ For SOFA purposes, the child may be the stepchild of the service member or member of the civilian component, even though the stepchild is not adopted and is a national of the host country.²⁸⁷ In interpreting the phrase "depending on him or her for support," it is neither necessary nor desirable to adopt or adapt definitions that may be found in either host nation law or sending state law.²⁸⁸ Thus, although the U.S. Internal Revenue Code specifies that a person is a dependent of another if the other person supplies one-half or more of the income or his or her other support,²⁸⁹ that rule

²⁸⁵NATO SOFA, art III(5).

²⁸⁶Generally, the trend had been to remove all disabilities associated with illegitimacy, e.g., Federal Republic of Germany, Grundgesetz, Art. 6, provides for equal treatment for illegitimates in their upbringing and development.

²⁸⁷1st Indorsement, AEAJA-IA, subject: Request for Interpretation of SOFA, 27 Feb. 1981.

²⁸⁸See Fitzmaurice, *supra* note 248, at 9-22, 20-21.

²⁸⁹I.R.C. § 152(a).

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should not be generalized to be the measure of dependency under the NATO SOFA. Likewise, because U.S. tax laws define a dependent child as being eighteen years or younger or a full-time student,²⁹⁰ domestic statutory age limits do not affect the definition of dependency under SOFA. The SOFA sets no age limit for a child to be classified as a dependent. Rather, as long as the individual is the child of a member of the force or of the civilian component and is dependent for support upon the member, then he or she may be classified as a dependent regardless of age. Applying the natural meaning test to determining whether or not an individual is dependent upon a member for support, it is reasonable to conclude that the child's income from sources besides the parent must be either nonexistent or inadequate to provide for the child's basic needs. If the child were to earn an income sufficient to supply him or her with food, clothing, and shelter in reasonable quantities and of reasonable quality, that child, assuming the child was not a minor under either sending state or receiving state law, should not be classified as a dependent. If the child is a minor under sending or receiving state law and is not otherwise emancipated from parental control, that child may be classified as a dependent even though he or she may have an income in excess of that necessary for basic needs. If the child is no longer a minor but is either unable or unwilling to support himself or herself and in fact is supported by the member of the force or civilian component, that non-minor child would be dependent within the meaning of SOFA, although the sending state authorities may choose to place internal regulatory restrictions upon the exercise of SOFA privileges by that non-minor dependent.²⁹¹ The SOFA does not require that the dependent child live in the same household with the member of the force or of the civilian component,²⁹² thereby making it possible for the dependent child to live elsewhere for education, health, or other reasons.

3. *Close Relatives.*

In addition to spouses and children of members of the force or civilian component being classified as dependents under SOFA, the Supplementary Agreement with the Federal Republic of Germany permits a close relative of the member of the force or of the civilian component who is not a spouse or a child to be treated as a dependent

²⁹⁰*Id.* at § 152 (e)(1)(B).

²⁹¹U.S. Army, Europe Reg. No. 608-21, Members of Household [hereinafter cited as USAREUR Reg. 608-21].

²⁹²U.S. Forces regulations require children over 21 to live in their parents' household or forfeit status. *Id.*

as well.²⁹³ This provision is a continuation of the rule under the Forces Convention,²⁹⁴ which governed the status of forces in Germany prior to the German accession to the SOFA and the entry into force of the Supplementary Agreement. The Supplementary Agreement does not define either “close” or “relative.” Presumably, a “relative” is anyone related to the sponsor by either blood or marriage. A “relative” could also be construed to include the legal ward of the sponsor. Closeness is likewise an undefined concept. While various forces’ implementing regulations have attempted to restrict the definition of close relative,²⁹⁵ such definitions and their interpretations within the context of an internal regulation do not necessarily define the term as it is found in the Supplementary Agreement. Perhaps the better way of defining “close” in the Supplementary Agreement is in terms of the other conditions placed upon a close relative qualifying as a dependent. These are that the relative is dependent on the member of the force or civilian component for either financial or health reasons or both, that the relative is in fact supported by the member, that the relative must share the quarters by the member, and that the relative must be present in the Federal Republic of Germany with the consent of the sending state authorities. Under this approach, any relative who is in fact dependent upon, is supported by, and lives with the member is close enough to be brought within the ambit of Article 2(2)(a). An arrangement arising out of convenience, rather than actual dependency, would be contrary to the natural meaning of the article and should not be permitted.²⁹⁶

4. *Loss of Dependent Status.*

Under the SOFA, a spouse or a child is eligible to be a dependent for only as long as the member of the force or civilian component is assigned to or employed in that particular receiving state. When the sponsor dies, is no longer employed by the force in either a civilian or military capacity, or is transferred from the host nation territory,

²⁹³Supplementary Agreement, art. 2(2)(a).

²⁹⁴Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany, May 26, 1952, 6 U.S.T., 4278, T.I.A.S. No. 3425, U.N.T.S., art. 7.

²⁹⁵USAREUR Reg. 608-21.

²⁹⁶Art. 2, Protocol of Signature requires the authorities to limit as far as possible, the number of close relatives admitted to the Federal Republic. Permitting close relative status where there is no need for the member of the force or of the civilian component to actually support the relative would clearly not be limiting the number “as far as possible.”

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the dependents' eligibility for status under the SOFA ceases.²⁹⁷ Under the Supplementary Agreement with the Federal Republic of Germany, dependents, to include close relatives, may remain in the federal territory with dependent status for a period of ninety days after the sponsor dies or is transferred.²⁹⁸

VI. EVALUATION OF INDIVIDUAL STATUS AND RIGHTS UNDER SOFA

A. SOFA STATUS AND OTHER FORMS OF INTERNATIONAL STATUS COMAPRED

The next issue is whether or not the status under the SOFA is more akin to the private alien residing abroad or that of the diplomatic and consular personnel being sent to a foreign country by their government. For the alien living abroad, status results not from qualities that he or she possesses, but rather the qualities that he or she lacks. Being an alien is essentially a matter of not being a national; whether or not an individual is a national of a particular country depends on that country's domestic law.²⁹⁹ For the vast majority of people, nationality is determined by either where they were born or by the citizenship of their parents. The state does not take any affirmative action to confer nationality upon such persons, but merely looks to see if they meet the qualifications expressed in domestic law. Other persons obtain nationality by means of the naturalization procedures prescribed by the domestic law of the country of which they are becoming a national. In the case of naturalization, the state does not merely look at individuals to see whether or not they meet certain criteria, but rather, through an affirmative act of that state, declares that individual to be their national.

That an individual may meet the criteria for nationality for more than one state illustrates that whether one is a national or an alien is the result of the application of domestic law rather than a status in international law created by the actions of states. Such situations normally occur where the individual is born in one state of a parent who is a citizen of another state so that the child receives one citizenship under *ius solis* and the other citizenship under *ius sanguinis*.³⁰⁰ In such dual national situations, both states may claim the individual as their national and may act on the individual's behalf should the

²⁹⁷Since a dependent's status is derived from the member of the force or member of the civilian component, the permanent departure of the sponsor eliminates the dependents eligibility for SOFA status.

²⁹⁸Supplementary Agreement, art. 2(2)(b).

³⁰⁰*Id.* at 97-98.

individual need assistance in a third country. However, one nation may not act to protect its national in the territory of another state which also claims that person as a national.³⁰¹ This impasse between states has sometimes resulted in treaties governing such matters as military service of the dual national.³⁰² In such dual national situations, neither state contests the legal conclusion that the individual is the national of the other state, but rather looks exclusively to its own domestic law in its dealings with that individual. Dual nationality is therefore not a matter of status disputed between two states, but is rather a duality of status.

Diplomatic and consular personnel, on the other hand, do not obtain their status through the action of any state's domestic law, but rather obtain their status as the result of the agreement between the sending and receiving state governments.³⁰³ Diplomatic personnel are accredited to the receiving state government by the sending state government. The receiving state must make its *agreement* before an individual is accepted as a head of mission, although he or she would still have diplomatic protections for returning to the sending state should the *agreement* be denied or withdrawn.³⁰⁴ The head of a consular post is given a commission notifying the receiving state that he or she has been appointed by his or her government,³⁰⁵ and is then authorized by the receiving state's *exequatur* to perform consular functions.³⁰⁶ Other diplomatic and consular personnel do not normally have to be formally accepted by the receiving state government, but the receiving state authorities must be notified of the arrivals and departures of such personnel.³⁰⁷ Both diplomatic and consular personnel are given their status by state action because of their official purpose for which they are sent to the receiving state.

Persons having status under the SOFA are similar to diplomatic and consular personnel in that they are sent abroad as the agents of their governments to fulfill the mutual defense obligations of the North Atlantic Treaty. As with diplomatic and consular personnel, the types and degrees of privileges and immunities for government

³⁰¹*E.g.*, N. Leach, C. Oliver, & J. Sweeny, *The International Legal System* 542-47 (1973).

³⁰²*E.g.*, Protocol Relating to Military Obligations in Certain Cases of Dual Nationality, April 12, 1930, 50 Stat. 1317 (1930), T.S. No. 913. 178 U.N.T.S. 227.

³⁰³Diplomatic Convention, art 2; Consular Convention, art. 2(1).

³⁰⁴Diplomatic Convention, arts. 4, 9(1).

³⁰⁵Consular Convention, arts. 10, 11.

³⁰⁶*Id.* at art. 12.

³⁰⁷Diplomatic Convention, arts. 7, 10; Consular Convention, arts. 19, 24

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agents abroad may vary, but they exist because they facilitate the exercise of the government agent's official functions. Having the status of a government agent means that the sending state has done some appointing act which changes the individual from the status of a private citizen to the status of government representative. This appointing act is clearly present in the case of the member of force, who must first change status to that of a member of the armed forces by being enlisted, conscripted, or commissioned, and then by being ordered to perform duties in Germany or another receiving state. Likewise, the member of the civilian component is hired to perform in a government position abroad and is given an identification card and either a special passport or a special entry in his or her passport³⁰⁸ showing that he or she is a member of the civilian component. Because their status is derivative, dependents must have a sponsor who is granted status as a member of the force or of the civilian component and must also receive from the appropriate sending state authorities an identification card and either a special passport or a special entry in their passports. In all three cases, the sending state authorities perform an affirmative act which conveys upon the member of the force, member of the civilian component, or dependent his or her status under the agreements. This act, when viewed within the entire context of the law of international status of government agents, may only be construed as being constitutive, rather than as a mere recognition of an already existing legal status. Meeting the treaty requirements for being a member of the force, member of the civilian component, or a dependent establishes eligibility for the status, but does not establish the status itself.

The power to perform this constitutive act is vested in the authorities of the sending state. Special international status, such as is accorded to diplomatic, consular, and SOFA personnel, comes into being by the agreement of the sending and the receiving states. In the case of ambassadors and certain other diplomatic personnel, status may be conferred by agreement between the states on each individual appointment. In other cases, such as under the SOFA and Supplementary Agreement, agreement may be reached that the sending state may confer special status on certain classes of people. The receiving state may, by agreements with the sending states or by its own laws, place restrictions on various categories of personnel having SOFA status,³⁰⁹ provided that such unilateral restrictions do not violate the terms of the SOFA itself.

³⁰⁸NATO SOFA, art. III(3).

³⁰⁹S. Lazareff, *supra* note 4, at 90-91.

The administrative determination as to who is eligible for and receives SOFA status is relegated to the sending state authorities.³¹⁰ Such determinations are sovereign acts of the sending state which are permissible because of the limited waiver of territorial sovereignty made by the receiving state by its accession to the SOFA. Should the receiving state wish to dispute a given determination, it must proceed through diplomatic channels to the authorities of the force, rather than by judicial or administrative actions against the individual. This principle should apply even in situations where the status is erroneously granted. While the sending state authorities have an obligation to correct such errors as expeditiously as possible, the individual should be allowed to continue to exercise all privileges without penalty imposed by the host nation until the competent sending states authorities revoke the status. An exception would be in a case in which the status was originally obtained or subsequently preserved by the individual's misconduct, in which a retroactive withdrawal of status would be reasonable.³¹¹

B. SOFA PRIVILEGES AND INTERNATIONAL INDIVIDUAL RIGHTS

In the earlier discussion of international individual rights, it was noted that, while, historically, individuals had no standing in international law, since World War II, various states have by treaty created individual rights that are enforceable internationally. Six criteria for determining if an international individual right has been created. These are that the states must consent to individual rights, that the treaty must show an intent to deal with individuals, that the treaty must describe the individual rights granted, that there must be an international forum, that the states must consent to be bound by the forum's decisions, and that the individual must have access to the forum.

The parties to the SOFA have, by their entry into the agreement, consented to any individual rights that may have been created within the natural meaning of the agreement. Arguably, the various articles³¹² of the SOFA which note which privileges individual members

³¹⁰*Id.* at 94.

³¹¹An analogy may be drawn to cases in which citizenship has been revoked because of fraud in procuring U.S. naturalization. In such cases, it has been uniformly held that a retroactive revocation is permissible, 3C. Gordon & H. Rosenfield, *Immigration Law and Procedure*, § 20.2 (rev. ed. 1982). If retroactive action is permissible in the termination of citizenship, then it should be permissible in the termination of status under the treaties, which is a much lesser action in terms of its effect on the individual.

³¹²*E.g.*, NATO SOFA, arts. IX, X.

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of the force, members of the civilian component, and their dependents may exercise may describe individual rights. However, it is difficult to construe the SOFA as having been intended to deal with individuals as such, rather than dealing solely with the relationships of states. There is no language focusing on the individual in the SOFA, such as exists in the Treaty of Rome and the European Human Rights Convention. As is highlighted in the Preamble to the SOFA, the purpose of the SOFA is to define the status of *forces* of one party sent by arrangement to serve in the territory of another party. SOFA privileges exist solely because of the individual's affiliation with the military forces present in the receiving state. As has been written,³¹³ the SOFA was intended to protect the sending state and its personnel from undue expenses and administrative burdens while performing temporary service in the receiving state brought about by the defense commitment of one state to its ally. Which individuals receive privileges under the agreements is determined by the sending state authorities based on military requirements to fulfill the mission and on whatever is needed to preserve amicable relations with the host nation authorities. The individual may benefit from SOFA privileges, but the sending state is the intended beneficiary.

The North Atlantic Council is designated in Article XVI as the sole forum for resolving any disputes over the interpretation or application of the SOFA which cannot be resolved by negotiations between the parties.³¹⁴ Given the language of Article XVI, which deals solely with differences between contracting parties, as well as the political, rather than judicial nature of the council,³¹⁵ is clear that the council is not an international forum in which an individual may seek redress.

It may be possible for an individual to seek redress for loss of SOFA-related privileges before the European Court of Human Rights, provided that the grievance could be couched in terms of a violation of rights acknowledged by the Convention. Such an action may be effective against a receiving state which is also a party to the European Human Rights Convention, but would not be possible against the government of a state not party to the Convention, such as the United States.³¹⁶

³¹³Crosswell, *supra* note 2, at 117.

³¹⁴NATO SOFA. art. XVI.

³¹⁵North Atlantic Treaty Organization, NATO Handbook 45-46 (1979).

³¹⁶For a further (but dated) discussion of this concept, *see* G. Draper, *supra* note 180, at ch. 8.

While no international individual rights are created by the SOFA, except perhaps tangentially through the Human Rights Convention, individual rights may be created under a state's domestic law by assimilating the SOFA's principles into domestic law in enabling legislation or by direct application in the courts. However, a discussion of the domestic law assimilation of the SOFA is beyond the scope of this article.

VII. CONCLUSION

The members of the force, members of the civilian component, and their dependents are not merely aliens living abroad at the sufferance of the host nation. Rather, they, like diplomatic and consular personnel, are the agents of their government in fulfilling their nation's obligations under international law. In order to facilitate their performance of official functions, they are granted various privileges and immunities by treaty. Such privileges and immunities, however, exist for the benefit of the military forces as a whole, and not for the benefit of them as individuals.

The sending state's authorities are granted considerable administrative power in the territory of the receiving state. Within the scope of the waiver of territorial sovereignty, the authorities of the sending states exercise their own state's sovereignty and their acts are not subordinate to or reviewable by the authorities of the receiving state. However, in order to preserve good relations with the host nation, the sending state's authorities at every level must clearly understand that status under the SOFA is not merely a license to use the facilities of the force which may be granted by whim or for the sake of local expediency. Failure to exercise appropriate care in determining eligibility and in granting SOFA status can have severe adverse impact on all members of the force, members of the civilian component, and their dependents and perhaps adversely affect the ability of the U.S. forces to fulfill their defense mission as well.

THE STANDARD FOR ADMITTING SCIENTIFIC EVIDENCE A CRITIQUE FROM THE PERSPECTIVE OF JUROR PSYCHOLOGY*

by Professor Edward J. Imwinkelried**

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***57 Mil. L. Rev. 1 (1972).

By a wide margin, the Wayne Williams case is the most highly publicized prosecution in recent memory.' A number of factors account for that notoriety. Certainly, one reason was the incredibly long string of homicides that led to the case. Another factor was the unprecedented atmosphere of fear that had gripped an entire city. But there was another reason why the *Williams* case was so highly publicized. That reason was best summarized by Bennett Beach, the Legal Editor of *Time* magazine. Mr. Beach stated that the *Williams* case "highlight[ed] a major development in the courtroom. With the help of . . . [scientific] advances, more and more silent [physical] evidence is being turned into loudly damning testimony."²

The *Williams* case is certainly by no means an isolated phenomenon. In 1980, the National Center for State Courts released the results of a nationwide survey of practicing attorneys and judges.³ The finding was that almost half the judges and attorneys surveyed encountered scientific evidence in a third of the cases that they took to trial.⁴ The most recent issue of the American Bar Association Journal is further evidence of this trend. The issue contains an article by one of the leading American forensic scientists, Dr. John Thornton of the University of California, Berkeley. In that article, Dr. Thornton asserts: "[F]orensic science is already used extensively in contemporary legal processes, and shows every indication of being used to an even greater extent in the near future."⁵ The trend, then, is clear and unmistakable.

The trend is of special significance for the military community. For example, the advent of the urinalysis program will certainly make scientific evidence a lively topic again in the military. Furthermore, your facility, Fort Gordon, is widely regarded as one of the best forensic laboratories in the United States. Lastly, with the exception

¹See generally *Williams: 'Prior Bad Acts'?* Newsweek, January 25, 1982, at 39; *Williams: Guilty as Charged*, Newsweek, March 8, 1982, at 31; A "Shark" Goes After the Evidence, Time, January 18, 1982, at 25; *Williams in the Dock*, Newsweek, January 18, 1982, at 39; *The Trial of Wayne Williams*, Newsweek, December 28, 1981, at 40; *The Atlanta Case: Murder Times Two*, Newsweek, July 27, 1981, at 28; *Atlanta: Profile of a Suspect*, Newsweek, July 6, 1981, at 22; *Case of the Green Carpet*, Time, July 6, 1981 at 12; *Is He a Suspect or Isn't He*, Newsweek, June 29, 1981, at 38; *Atlanta: A Break That Never Came*, Newsweek, June 15, 1981 at 35; *City of Fear*, Time, March 2, 1981, at 31.

²This is the view of Bennett Beach, legal editor of *Time* magazine. See *Mr. Wizard Comes to Court*, Time, March 1, 1982, at 90.

³Nat'l Center for State Courts Report, Study to Investigate Use of Scientific Evidence, vol. 7, no. 8, August, 1980, at 1.

⁴*Id.*

⁵Thornton, *Uses and Abuses of Forensic Science*. 69 A.B.A.J. 288 (1983)

of the Northwestern and University of Richmond Law Schools, the J.A.G. School is probably the American Law school that has placed the greatest curricular emphasis on scientific evidence. For all these reasons, the trend toward the greater use of scientific evidence is of special interest to the people in this room.

The temptation for both civil and military practitioners is to rush to support that trend and to welcome increased reliance on scientific evidence. But before we do that, we should pause to consider some disturbing facts. In 1980, the Food and Drug Administration charged that of the 12,000 clinical researchers in the United States, "probably ten percent do something less than [honest research]."⁶ In 1981, outright fraud was discovered in one of the most prestigious cancer research programs in the United States at Cornell University.⁷ Early this year, a medical journal charged that fifteen percent of the medical laboratory test findings are erroneous.* All these facts ought to give us a sober second thought before we join the cult of science and applaud the trend toward the greater use of scientific evidence. We ought to stop today and assess that trend; we should ask ourselves whether we want to support or reverse that trend.

This is certainly an opportune time for the military to undertake that reassessment. You have the new Military Rules of Evidence. I commend to you the Drafters' Analysis of Rule 702. In the analysis of Rule 702, you find a rather tantalizing remark that the new Military Rules of Evidence may—not will—but may change the standard for admitting scientific evidence in military courts-martial. The Drafters were, in effect, inviting the military courts at this juncture to look at this trend and ask whether it is a trend the military should join in. To answer that question, I would like to consider three topics today: the causes of the trend, secondly, the criticisms of the trend, and, thirdly, an objective, dispassionate analysis of the merits of that trend.

The Causes of the Trend

Let us begin by talking about the causes. One cause is clear: the pace of technological change. In the words of the Utah Supreme Court, "[This is] an age when one scientific advancement tumbles in rapid succession upon another."⁹ This scientific productivity is understandable. It has been estimated that 90 percent of the scient-

⁶Broad & Wade, *Betrayers of the Truth*, TWA Ambassador, Dec., 1981, at 42.

⁷*Id.* at 43-45.

⁸Bechtel, *Medical Tests: Don't Bet Your Life on Them*, Prevention, Jan. 1983, at 55. The author estimated that the 15 percent error rate accounts for approximately four million erroneous test results daily. *Id.*

⁹Phillips v. Jackson, 615 P.2d 1228, 1234, (Utah 1980).

ists who have ever lived, who have ever walked on the face of the earth, are alive right now.¹⁰ Five thousand of those scientists and scientific technicians are full-time employees of American crime laboratories. That technological reality is the most obvious reason for the increased use of scientific evidence. But there are two other reasons that are very important; one is evidentiary.

In 1954, when Dean McCormick wrote the first edition of the renowned McCormick on Evidence, he included this statement: "The manifest destiny of evidence law is a progressive lowering of the barriers to truth."¹¹ I do not think that there is any inexorable Helgelian dialectic at work in American evidence law that is inevitably pushing us towards a lowering of those barriers. But at least in the area of scientific evidence, the Dean's prediction seems to be coming to pass.¹²

Until very recently, *the* barrier to the admission of scientific evidence was the *Frye* test.¹³ *Frye v. United States* is a 1923 decision of the District of Columbia Court of Appeals.¹⁴ It was the first American appellate decision to reject one of the precursors of the polygraph, the systolic blood pressure test. In that case the announced reason for excluding the evidence was that the technique had not gained general acceptance within the relevant scientific circle.¹⁵ It is important to understand the nature of that ruling. The court is not saying that the lack of general acceptance cuts to the weight of the evidence. Rather, the court is saying that it is not enough for the

¹⁰Broad & Wade, *supra* note 6, at 42.

¹¹C McCormick, Handbook of the Law of Evidence 165 (1954).

¹²See Imwinkelried, A New Era in the Evolution of Scientific Evidence: A Primer on Evaluating the Weight of Scientific Evidence, 23 Wm. & Mary L. Rev. 261 (1981). See also, Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States a Half-Century Later*, 80 Colum. L. Rev. 1197, 1237, 1245-46 (1980); Note, 64 Cornell L. Rev. 875, 880-85 (1979).

¹³See Gianelli, *supra* note 12, at 1204. See also, Note, 40 Ohio St. L.J. 757, 759 (1979).

¹⁴293 F. 1013 (D.C. Cir. 1923).

¹⁵*Id.* at 1014. In affirming the defendant's conviction, the *Frye* court found that the lie-detector test had not gained sufficient standing and scientific recognition to justify the admissibility of expert testimony regarding the results of such a test. *Id.* In much quoted language, the *Frye* court stated that:

[j]ust when the scientific principle or discovery crosses the line between the experimental and demonstrable states is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*

Id. (emphasis added).

expert to declare on the record that in his or her opinion, this is a valid technique and a reliable instrument; another condition precedent to the admissibility of the evidence is the expert's voucher that its validity and reliability and generally accepted within his or her specialty. Absent that voucher on the record, as a matter of law, the scientific evidence must be excluded.

Until very recently, this was not only the majority view in the United States, this was the almost universal view.¹⁶ In the mid-1970s, it was well settled in at least 45 states that *Frye* was the controlling law and that, absent a voucher of general acceptance,¹⁷ scientific evidence was automatically inadmissible.

That was not only a well settled barrier, it was also a formidable one. Take, for example, only one year's case law, 1977. In addition to accounting for the exclusion of such controversial techniques as polygraphy and sound spectrography, some of the promising forensic techniques excluded solely on the basis of *Frye* were the Decatur Ragun,¹⁸ the ion microprobe,¹⁹ and trace metal detection.²⁰ In each case, the appellate court's opinion read almost exactly alike: It is true that in the lower court the expert said that, in my opinion, it is a valid theory. However, the expert did not take the next step; the expert did not add on the record that it is generally accepted within my disci-

¹⁶*See, e.g.*, *United States v. Marshall*, 526 F.2d 1349, 1360 (9th Cir. 1975) ("polygraph has yet to gain general judicial recognition"); *United States v. Bruno*, 333 F. Supp. 570, 573 (E.D. Pa. 1970) (ink identification not yet sufficiently advanced to be admissible as evidence); *Reed v. State*, 283 Md. 374, 391 A.2d 364, 377 (1978) (testimony based on "voiceprints" inadmissible as evidence of voice identification, since "voiceprints" had not reached the standard of acceptance in the scientific and legal communities required by *Frye*); *Commonwealth v. Nazarovitch* 496 Pa. 97, 110, 436 A.2d 170, 177 (1981) (process of refreshing recollection by hypnosis has not gained sufficient acceptance to permit introduction of hypnotically-refreshed testimony). *But see* *United States v. Williams*, 583 F.2d 1194, 1198 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979) (to determine the admissibility of voiceprint analysis, the court must balance the materiality and reliability of the evidence against its tendency to mislead, confuse or prejudice the jury); *State v. Williams*, 388 A.2d 500, 505 (Me. 1978) (voiceprint analysis is sufficiently reliable to be relevant and admissible).

¹⁷Note, *supra* note 13, at 769.

¹⁸*State v. Boyington*, 153 N.J. Super. 252, 379 A.2d 486 (1977). The Decatur Ragun is an instrument which uses the Doppler radar effect to detect violation of the speed limit. *Id.* at 254, 379 A.2d at 487.

¹⁹*United States v. Brown*, 557 F.2d 541 (6th Cir. 1977). "Ion microprobe analysis is a technique for measuring the trace element of a sample matrix." Each matrix tested is compared to the others tested to see if they had a common origin (*e.g.*, victims hair and hair found on the defendant's clothing). *Id.* at 555.

²⁰*People v. Lauro*, 91 Misc.2d 706, 398 N.Y.S.2d 503 (Sup., Ct. Westchester County 1977). The "tract-metal detection test" determines whether an individual has recently held a metal object by applying a chemical solution and observing the affected area under an ultraviolet light. *Id.* at 711, 393 N.Y.S.2d at 506.

pline. Without that voucher, we must find error, perhaps not prejudicial error, but at least error. Obviously, *Frye* exacts a high cost. *Frye* builds in a lag time. You cannot accept a technique simply because the Nobel Prize winner takes the stand and testifies, "I have verified this theory to my satisfaction, and I stake my professional credentials on the theory." We have to wait until general acceptance builds up, until we can have that truthful voucher.

Precisely because of that high cost, during the last few years there has been much slippage away from *Frye*.²¹ I would like to talk briefly about the way in which that slippage has occurred. In some jurisdictions, it has occurred on the basis of case law. *Frye* itself is a decisional ruling of the District of Columbia Court of Appeals. In a number of states, Florida,²² Georgia,²³ Iowa,²⁴ Kentucky,²⁵ Michigan,²⁶ New York,²⁷ Oregon,²⁸ and Utah,²⁹ we have either intermediate appellate court or supreme court decisions explicitly rejecting *Frye* and saying that it is time to abandon that restrictive barrier to scientific evidence. Other jurisdictions have taken a different route, statutory construction. To appreciate the importance of that route, it is critical to realize that twenty-two jurisdictions, including the military, have

²¹See Imwinkelried, *Evidence Law and Tactics for the Proponents of Scientific Evidence*, in *Scientific and Expert Evidence* 33, 43 (2d ed. 1981). For a general discussion on the relaxation of the *Frye* standard, see Imwinkelried, *supra* note 12, at 264-67.

²²*Coppolino v. State*, 223 So. 2d 68 (Fla. Dist. Ct. App. 1968), *appeal dismissed*, 234 So. 2d 120 (Fla. 1969), *cert. denied*, 399 U.S. 927 (1970) (trial judge has wide discretion in admitting evidence, and his decision concerning the admissibility of evidence will not be disturbed absent abuse of discretion).

²³*Harper v. State* 249 Ga. 519, 292 S.E.2d 289 (1982) (the proper test for determining the admissibility of a scientific procedure is not whether the technique has gained acceptance in the scientific community but whether the procedure has reached a scientific state of verifiable certainty).

²⁴*State v. Hall*, 297 N.W.2d 80 (Iowa 1980), *cert. denied*, 450 U.S. 927 (1981) (reliability sufficient basis for admission of bloodstain and blood spatter analysis).

²⁵*Brown v. Commonwealth*, 639 S.W. 2d 758 (Kan. 1982) (blood test results admissible even though not widely used, since they were supported by a qualified expert witness).

²⁶*People v. Young*, 106 Mich. App. 323, 308 N.W.2d 194 (1981) (jury permitted to hear expert testimony on electrophoresis blood analysis, since a qualified expert vouched for electrophoresis).

²⁷*People v. Daniels*, 102 Misc. 2d 540, 545-46 422 N.Y.S. 2d 832, 837 (Sup. Ct. Westchester County 1979) (test for admissibility of polygraph evidence should be merely whether there is probative value, since to require general acceptance would mandate absolute infallibility).

²⁸*State v. Kerstring*, 50 Or. App. 461, 623 P.2d 1095, (1981), *aff'd*, 292 Or. 350, 638 P.2d 1145 (1982) (only foundation required for the admission of a scientific technique which is not generally accepted is credible evidence sufficient for the trial judge to make the initial determination that the technique is reasonably reliable).

²⁹*Phillips v. Jackson*, 615 P.2d 1128, 1236-38 (Utah 1980) (applying a "reasonable reliability" test to a human leucocyte antigen test in a paternity action).

adopted codes patterned upon the Federal Rules. I direct your attention to a Federal Rule that is often overlooked. On its face, it is one of the most innocuous provision; but in terms of the long-term growth of evidence law, it may be the most significant provision, namely Federal Rule **402**. **402** says simply that relevant evidence is admissible unless otherwise provided by "the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." What is missing from that list? Case law. Constitution, statute, court rule, but not case law. The legislative intent was to deprive the trial bench of the power to create new exclusionary rules of evidence. Under Rule **402**, there must be a constitutional, statutory, or court rule basis for excluding relevant evidence that passes muster under Rules **401** to **403**. You can start with Article 1 of the Rules and work all the way to Article 11. Nowhere is **Frye** codified. You never see the phrase "general acceptance" in the context of the admissibility of scientific evidence anywhere in the Federal Rules. The argument of statutory construction is straightforward: Since **402** requires a constitutional, statutory, or court rule basis for excluding evidence that passes muster under **401** through **403**, **Frye** has been impliedly abolished.

Based upon that argument, seven jurisdictions have already committed to the view, or are on the verge of committing to the view, that **Frye** is overruled by statute. The Court of Appeals for the Second Circuit,³⁰ the Northern District of Illinois,³¹ and four state supreme courts, **Maine**,³² **Montana**,³³ **New Mexico**,³⁴ and **Ohio**³⁵ which have rules patterned after the Federal Rules, have reached that result. It has also been argued in California that the passage of Proposition 8, the so-called "Victim's Bill of Rights," will have the same effect as

³⁰See *United States v. Williams*, 583 F.2d 1194 (2d Cir. 1978), *cert. denied*, 439 **US** 1117 (1979). By applying Rule 702 of the Federal Rules of Evidence, the *Williams* court determined that "spectrograph voice analysis evidence [was] not so inherently unreliable or misleading as to require its exclusion from the jury's consideration in every case." *Id.* at 1200. Rule 702 provides that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. **702**. See also Note, *supra* note 12.

³¹See *United States v. Dorfman*, 532 F. Supp. 1118, 1134 (N.D. Ill. 1981).

³²See *State v. Williams*, 388 A.2d 500 (Me. 1978) (admission of scientific evidence requires only a showing that the evidence is relevant and of assistance to the trier of fact).

³³*Barmeyer v. Montana Power Co.*, 657 P.2d 594 (Mont. 1983).

³⁴*State v. Dorsey*, 87 N.M. 323, 532 P.2d 912 (Ct. App.), *aff'd*, 88 N.M. 184, 539 P.2d 204 (1975). (polygraph evidence admissible under governing evidentiary rules). See also *Romero, The Admissibility of Scientific Evidence Under the New Mexico and Federal Rules of Evidence*, 6 N.M.L. Rev 187 (1976); Note, *supra* note 13.

³⁵*State v. Williams*, 33 Crim. L. Rep. (BNA) 2051 (Ohio Sup. Ct. March 23, 1983).

Rule 402, impliedly overturning *Frye*.³⁶

We have seen the slippage based upon case law and statutory construction. In addition, under the sixth amendment, two jurisdictions have found a constitutional right to present critical, reliable evidence, including scientific evidence. There are two polygraph cases in which the courts found a sixth amendment basis for overriding the statutory or common law rule that seemingly blocked the defense evidence.³⁷

The upshot is that there are now two federal circuits and thirteen states where the precedential value of *Frye* is nonexistent or at least seriously questionable. That is how much movement there has been in the past five years away from *Frye*. We have noted the technological and evidentiary reasons for the trend toward the increased use of scientific evidence.

There is one other catalyst. Most of the evidence of this catalyst is anecdotal. Perhaps the best anecdote was told to me by an East Coast prosecutor several years ago.³⁸ He had a case which he thought was fantastic. He was surprised that the defendant did not plead guilty before trial. At trial, things got even better. The defendant took the stand and was a miserable witness. The prosecutor has visions of a quick conviction dancing in his head. The jury went and stayed out an agonizingly long time. The jury eventually acquitted. In this jurisdiction, the prosecutor may talk to the jury as they leave the courthouse. The prosecutor ran up to the jurors and said, "Why did you acquit him? I had all this evidence. He was a terrible witness. Yet you walked him out of this courtroom a free man." A juror responded, "There was no fingerprint evidence." During that entire trial, no one ever mentioned the word "fingerprint" — not the judge, the prosecutor, or the defense counsel. The catalyst that we must be aware of is the expectation that lay jurors have for scientific proof of guilt. After years of watching *Hawaii Five-0*, *The F.B.I.*, and *Quincy*, these people are conditioned to expect scientific proof.

³⁶See Uelmen, *Proposition 8 Casts Uncertainty Over Vast Areas of Criminal Law*, Cal. Law., July/August 1982, at 45.

³⁷See *State v. Dorsey*, 87 N.M. 323, 532 P.2d 912 (Ct. App.), *aff'd*, 88 N.M. 184, 539 P.2d 204 (1975) (polygraph results admissible under due process clause when defendant's credibility is a crucial issue); *State v. Sims*, 52 Ohio Misc. 31, 362 N.E.2d 24 (C. P. Cuyahoga County 1977) (due process entitles defendant to new trial during which he may undergo a polygraph examination, the results of which can be disclosed to the jury). See also, Imwinkelried, *Chambers v. Mississippi: The Constitutional Right to Present Defense Evidence*, 62 Mil. L. Rev. 225 (1973).

³⁸See Imwinkelried, *supra* note 21, at 36-37.

This moral has not been lost upon experienced trial attorneys. Two years ago in New York, I had the opportunity to hear a lecture by Mr. E.J. Salcines. Mr. Salcines, the author of the National Association of District Attorneys' *Predicate Questions*³⁹ manual, is one of the best known lecturers on trial advocacy in the United States. During his presentation, Mr. Salcines stated that his current practice is that in any case in which a juror might expect fingerprint evidence but fingerprint evidence is lacking, he goes out of his way to put a fingerprint technician on the stand to explain the lack of fingerprint evidence. The expectation is so high and widespread that any prosecutor risks an unjustified acquittal if he or she disregards that expectation. If that expectation is disappointed, that disappointment may be the cause of an acquittal.

The Criticisms of the Trend

We have discussed all the reasons — technological change, the evidentiary reason, and the expectation of scientific proof of guilt — that account for the trend toward the greater use of scientific evidence. We turn now to the criticisms of that trend. We are so enamored with the cult of science that our initial reaction is to think that there will inevitably be greater use of scientific evidence and that, moreover, it will necessarily be beneficial. Both propositions are far from true.

It is not inevitable. For much of the legal history of this country, we have had restrictive rules on the admissibility of scientific evidence. If there is a high incidence of error in scientific analysis or lay jurors are incapable of assessing scientific evidence, it may not be beneficial that we move in this direction.

These are the very criticisms that are being made of this trend toward the greater use of scientific evidence. First, there is mounting evidence of a high rate of misanalysis in crime laboratories. Second, there is a widespread belief that lay jurors cannot critically evaluate complex, arcane scientific testimony.

There is substantial evidence that the first criticism is well founded. The late 1950s witnessed the first inkling of the problem, a report by the Toxicology Section of the American Academy of Forensic Sciences.⁴⁰ In a random survey of toxicology laboratories doing blood alcohol analysis, that Section found "a great degree of error." If we move to the research in the early 1970s by Dinovo and Gottschalk in the area of drug analysis, they reported disturbing interlabora-

³⁹E. Salcines, *Trial Technique—Predicate Questions* (Nat'l District Att'y Ass'n 1977).

⁴⁰See Niyogi, *Toxicology*, in *Scientific and Expert Evidence*, 343,383 (2d ed. 1981).

tory variation in the qualitative and quantitative analysis of drugs.⁴¹

Those two studies were on a small scale, but they set the state for a larger study by the Law Enforcement Assistance Administration during the mid-1970s, the Laboratory Proficiency Testing Program.⁴² Two-hundred thirty-five to 240 crime laboratories throughout the United States participated in the various tests. The samples were handled in this fashion: The Project Advisory Committee first had the samples assayed by analytical laboratories. Thus, the committee knew the findings that a good laboratory breakdown of the samples would yield. They sent the samples blind to 240 crime laboratories throughout the country. They asked them to analyze the same samples. They tried to determine how many of the responses were unacceptable, either inaccurate or incomplete. On three of the 21 samples, fewer than half of the laboratories arrived at complete, correct results.⁴³ Over one-half of the laboratories reported results that the Project Advisory Committee deemed unacceptable. You might as well have flipped a coin, rather than sending these samples to the crime laboratories.

The most recent research confirms that the problems exposed by the Laboratory Proficiency Testing Program have not evaporated. The January 1983 issue of the *Journal of Forensic Science* describes a new survey of the capability of toxicology laboratories.⁴⁴ The survey included 105 laboratories representing 49 states.⁴⁵ The survey tested both qualitative and quantitative analysis.⁴⁶ Qualitatively, the survey reports "disappointing" performance—a large number of false negatives and false positives.⁴⁷ Turning to quantitative analysis, the surveyors report "considerable" variation.⁴⁸ On some samples, the coefficient of variation was 133percent,⁴⁹ a range that could make a great difference in a jurisdiction where the quantum of sentence depends upon the quantity of contraband or where an inference of

⁴¹Dinovo & Gottschalk, *Results of a Nine-Laboratory Survey of Forensic Toxicology Proficiency*, 22 Clin. Chem. 843 (1976). The testing was designed "to assist the National Institute on Drug Abuse in its efforts to improve the investigating and reporting of drug related deaths in nine major U.S. cities . . .". *Id.* The study's major finding was that the nine laboratories examined "varied considerably in the precision and accuracy with which they performed drug assays." *Id.* at 846.

⁴²Project Advisory Committee, *Laboratory Proficiency Testing Program* (1975-76).

⁴³LEAA Newsletter, September, 1978, at 1, col. 1, at 5, col. 1.

⁴⁴Peat, Finnigan, & Finkle, *Proficiency Testing in Forensic Toxicology: A Feasibility Study*, 28 J. Forensic Sci. 139 (1983).

⁴⁵*Id.* at 141.

⁴⁶*Id.* at 144.

⁴⁷*Id.* at 139.

⁴⁸*Id.* at 157.

⁴⁹*Id.* at 156.

the intent to distribute may be drawn solely from the amount of contraband in the defendant's possession. It should be clear at this point that there is merit to the first criticism of the increased use of scientific evidence. But we have to go further.

The second criticism makes matters worse. The critics are saying not only that there is a shockingly high incidence of misanalysis in crime laboratories but also that the lay people sitting in the jury and the lay person presiding as judge are not sophisticated enough to detect the errors in the scientific analysis. This is a very widely held assumption by the courts. The courts have been especially critical of statistical scientific evidence.⁵⁰ Remember a case we all studied in law school, the infamous California magic couple case, *People v. Collins*.⁵¹ In *Collins*, the California Supreme Court styled statistical

⁵⁰Statistical proof is the presentation of mathematical probabilities of the happening of certain events. All evidence involves the question of probabilities. See Fed. R. Evid. 401 stating: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action *more probable or less probable* than it would be without the evidence." (emphasis added). A common example of the use of probabilities is fingerprint testimony in which an expert assesses the probability that several sets of prints were produced by the same person's hand. 2 J. Wigmore, Evidence 5 414 (Chadbourn rev. 1979). While the questions of probabilities are quite common, the use of mathematics experts to present statistical evidence has been rare. See Finkelstein & Fairley, *A Bayesian Approach to Identification Evidence*, 83 Harv. L. Rev. 489, 489 n.2 (1970) (citing seven cases). For a discussion of the use of statistics and probabilities in trials, see Kaplan, *Decision Theory and the Factfinding Process*, 20 Stan. L. Rev. 1065 (1968).

⁵¹68 Cal. 2d 319, 438 P.2d 33, 55 Cal. Rptr. 497 (1968). In *Collins*, a professor of mathematics testified that the probability of more than one set of persons having the characteristics of the perpetrators of the crime, as elicited from eyewitnesses, was one in twelve million. *Id.* at 325-26, 438 P.2d at 36-37, 66 Cal. Rptr. at 501. The court concluded that this evidence should not have been admitted on the ground, *inter alia*, that probability theory could not prove beyond a reasonable doubt that (1) the guilty couple *in fact* possessed the characteristics described by witnesses, and (2) only one couple possessing the characteristics could be found within the area. *Id.* at 330, 438 P.2d at 40, 55 Cal. Rptr. at 504-05. Since the case was closed, the admission of this evidence was prejudicial and warranted a new trial. *Id.* at 332, 438 P.2d at 41-42, 66 Cal. Rptr. at 505.

For other cases involving the use of mathematical probability theory, see *Miller v. State*, 240 Ark. 340, 343-44, 399 S.W. 2d 268, 270 (1966) (statistical evidence inadmissible since based on estimates and assumptions); *People v. Jordan*, 45 Cal. 2d 697, 707, 290 P.2d 484, 490 (1955) (expert's conclusions to certain probabilities were properly admitted, where since an adequate factual groundwork had been laid); *State v. Sneed*, 76 N.M. 349, 354, 414 P.2d 858, 862 (1966) (probability theory applied to identify the criminal inadmissible where the odds are based on estimates of unproven validity); *People v. Risely*, 214 N.Y. 75, 84-85, 108 N.E. 200, 202-203 (1915) (evidence of the probabilities that a forged document was typed on defendant's typewriter inadmissible where witness failed to qualify first as an expert in the mechanics of typewriters). For the earliest reference to the use of probability theory, see *The Howland Will Case*, 4 Am. L. Rev. 625, 648-49 (1870) (discussing *Robinson v. Mandell*, 20 F. Cas. 1027 (C.C.D. Mass. 1868) (No. 11959)) (use of probability theory in handwriting analysis).

evidence "a veritable sorcerer in our computerized society capable of casting a spell over the trier of fact."⁵²

While some of the most colorful language has been reserved for statistical evidence, in general the courts seem to be dubious of the trier of fact's capability to evaluate scientific evidence. Listen to the language in some of the other leading cases: a later California decision—"amisleading aura of certainty which often envelops a new scientific process,"⁵³ then Judge McGowan of the District of Columbia Court of Appeals charging that lay jurors often attribute a "mystic infallibility" to scientific proof;⁵⁴ and finally, a flat statement by the Maryland Court of Appeals that lay jurors routinely overestimate the certainty and objectivity of scientific evidence.⁵⁵

That assumption is one of the best rationales for the *Frye* test.⁵⁶ Note the dovetail effect between this criticism of the trend toward scientific evidence and the rationale for *Frye*. The proponents of *Frye* say that lay jurors have an exaggerated expectation, an exaggerated estimate, of the reliability of scientific evidence. On that assumption, *Frye* makes eminently good sense. *Frye* degrees that the only evidence to be admitted is evidence which can live up to that exaggerated expectation. Rather than permitting scientific evidence to be admitted whenever a qualified expert voices the opinion that it is a valid theory and a reliable instrument, *Frye* insists upon an added guarantee of trustworthiness, a voucher by the overwhelming majority of specialists in that scientific community. If that assumption is correct, *Frye* is a sound restriction on the admissibility of scientific evidence.

The cumulative effect of the two criticisms, the mounting evidence of misanalysis by crime laboratories and the widely held assumption that lay jurors are incapable of critically evaluating scientific evidence, is a powerful argument for caution, and for being much more skeptical of scientific evidence than we have been in the past.

⁵²68 Cal. 2d at 320, 438 P.2d at 33, 66 Cal. Rptr. at 497.

⁵³*People v. Kelly*, 17 Cal. 3d 24, 32, 549 P.2d 1240, 1245, 129 Cal. Rptr. 144, 149 (1976) (quoting *Huntingdon v. Crowley*, 64 Cal. 2d 647, 656, 414 P.2d 382, 390, 51 Cal. Rptr. 254, 262 (1966)).

⁵⁴*United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974). See also *United States v. Baller*, 519 F.2d 463, 466 (4th Cir.), cert. denied, 423 U.S. 1019 (1975) (relevant scientific evidence should not be excluded unless "an exaggerated popular opinion of its accuracy" is likely to prejudice the jury).

⁵⁵*Reed v. State*, 283 Md. 374, 385, 391 A.2d 364, 370 (1978).

⁵⁶See e.g., *United States v. Addison*, 498 F.2d 741 (D.C. Cir. 1974); *People v. Kelly*, 17 Cal. 3d 24, 549 P.2d 1240, 129 Cal. Rptr. 144 (1976); *People v. King*, 266 Cal. App. 2d 437, 72 Cal. Rptr. 478 (1968); *Reed v. State*, 283 Md. 374, 391 A.2d 364 (1978).

The Merits of the Trend

Having reviewed the causes and the criticisms of the trend, we shall finally attempt to make a balanced judgment about the merits of the trend. Consider the counterarguments to the criticisms of the increased use of scientific evidence. Even the most ardent proponent of the increased use of scientific evidence would have to make two concessions. First, there is hard evidence of a surprisingly high level of error in laboratory analysis, much higher than we originally anticipated. Second, common sense suggests that lay jurors with little or no scientific training will have some difficulty grappling with sophisticated scientific testimony. But even given those concessions, in the final analysis the criticisms of the increasing use of scientific evidence simply miss the point. The task is not an absolute judgment about the strengths or weaknesses of scientific evidence. The task is a comparative judgment. To the extent that we attach uniquely restrictive rules to scientific evidence, we discourage counsel from resorting to that type of evidence. My thesis today is that a comparison of scientific evidence with the other routinely admitted types of evidence leads to the conclusion that the differential treatment of scientific evidence is unsound, and that it is time to overthrow the *Frye* rule.

Let us revisit that first criticism favoring *Frye*, the evidence of misanalysis in crime laboratories. If we erect extraordinary barriers to scientific evidence, what other types of evidence will we have to rely on? The result in criminal prosecutions will probably be heavier reliance on lay eyewitness testimony. But even a cursory review of the witness psychology literature indicates that the errors in lay eyewitness testimony are as frequent and less controllable than the sources of error in scientific evidence.

Consider the frequency of error in lay eyewitness testimony. It's true that on three of the 21 tests of the Laboratory Proficiency Testing Program, the results were abysmal, under 50 percent. However, on most samples, the performance was fairly impressive. On a goodly number of them, the performance approached 99 percent.⁵⁷ Contrast that with what witness psychology tells us about lay eyewitness

⁵⁷Project Advisory Committee, Laboratory Proficiency Testing Program 251(1975-76).

ness testimony.⁵⁸ There are hundreds of studies in the United States, Germany, and Japan, consistently finding a high level of error in eyewitness identification reports.⁵⁹ Take one shocking example—the simulation that Doctor Buckout conducted in the late 1970s.⁶⁰ His finding was that only 15 percent of the observers of the simulated crime accurately identified the perpetrator a few days later. There is error in scientific evidence, but there is probably a greater margin of error in lay eyewitness testimony.

A further problem with the sources of error in lay testimony is that they are more intractable and less soluble than the sources of error in scientific analysis. The primary causes are the inherent weaknesses in the human processes of perception and memory.⁶¹ There is little that we can do to upgrade the quality of human memory or to control the witnessed fortuitous events that lead to prosecutions.⁶² In short, there is little that we can do to eliminate the sources of error in lay eyewitness testimony.

There is much that we can do to regulate the level and sources of error in scientific evidence. If the concern is the quality of perception, we can use a microscope to enhance the ability to perceive.⁶³ Using a scanning electron microscope, we can obtain a magnification of over 100,000. If the question is the quality of memory, we can use the photographic process to record the data that the other instrument yields;⁶⁴ if a scanning electron microscope can find the data, we can obtain a photomicrograph of it to preserve it. Lastly, in contrast to the fortuitous events that trigger prosecutions and civil lawsuits, we can replicate a scientific experiment to see if we can duplicate the test finding. We have a double-check that is lacking in the events that ordinarily lead to lay eyewitness testimony.

⁵⁸See E. Loftus, *Eyewitness Testimony* (1979); A. Yarmey, *The Psychology of Eyewitness Testimony* (1979); Buckout, *Eyewitness Testimony*, 231 *Sci. Am.* (no. 6) 23 (Dec. 1974); Buckout & Greenwald, *Witness Psychology*, in *Scientific & Expert Evidence* 1291 (2d ed. 1981); Levine & Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 *U. Pa. L. Rev.* 1079 (1973); Stewart, *Perception, Memory and Hearsay*, 1970 *Utah L. Rev.* 1 (1970).

⁵⁹For good bibliographies of the available literature in this area, see Loftus, *supra* note 58, at 237-47; Yarmey, *supra* note 58, at 230-67.

⁶⁰Buckout & Greenwald, *supra* note 58, at 1298.

⁶¹See, Levine & Tapp, *supra* note 58, at 1095-1103. See also H. Burt, *Applied Psychology* 292-301 (1941).

⁶²Levine & Tapp, *supra* note 58, at 1130.

⁶³See Judd, *Scanning Electron Microscopy as Applied to Forensic Evidence Analysis*, in *Scientific and Expert Evidence* 873 (2d ed. 1981).

⁶⁴See A. Moenssens & F. Inbau, *Scientific Evidence in Criminal Cases* 507-63 (2d ed. 1978).

If we compare scientific evidence with the competing types of evidence that will be more heavily relied upon if we restrict scientific evidence, scientific evidence fares well. That counterargument, though, would not be enough to overturn Frye. Even if the first criticism is unsound, the second criticism alone has enough substance to merit the continuation of Frye. The criticism, again, is the assumption that lay jurors cannot objectively evaluate the proper weight of scientific evidence. The real question is this: Is that assumption simply speculation, or is there hard evidence to support the assumption? The conclusion that I have reached after reviewing the available literature is that there is little or no evidence to support the assumption, and that almost all the available evidence points in the other direction.

We start with probably the most important study on jury behavior ever conducted in the United States, the Chicago Jury Project⁶⁵ reported in *The American Jury* by Professors Kalven and Zeisel.⁶⁶ Chapter 11 of that book is must reading for anyone who intends to study the capacity of lay jurors.⁶⁷ Chapter 11 deals with the jury's ability to follow the weight and the direction of the evidence. There are two findings reached in that chapter. One findings is that jurors generally understand the facts.⁶⁸ In fact, Kalven and Zeisel state the conclusion forcefully; the data is "a stunning refutation of the hypothesis that the jury does not understand" the facts.⁶⁹ Secondly, after charting the data to identify the direction and strength of the evidence, Kalven and Zeisel raise the question, "Can the jury follow the direction of the evidence?" The conclusion was that jurors are capable of doing that.⁷⁰ Once again the authors express their conclusion in definite terms; they state that the studies "corroborate strikingly the hypothesis that the jury follows the direction of the evidence."⁷¹

⁶⁵H. Kalven & H. Zeisel, *The American Jury* (1966). The study, conducted by the University of Chicago Law School and funded by the Ford Foundation, examined the dynamics of juries in criminal trials by submitting questionnaires to 3500 judges of which 555 "[c]ooperated fully." *Id.* at 33-44. The judges were asked to answer specific questions about the actual cases before them, particularly concerning the crime involved, the witnesses' testimony, and the attorneys' abilities. Most importantly, the judges were asked to compare how they would have decided the case with the jury's verdict. *Id.* *The American Jury*, represents the first significant study of the role of the jury in the American criminal justice system. See Kaplan, *Book Review*, 115 U. Pa. L. Rev. 475 (1967).

⁶⁶H. Kalven & H. Zeisel, *supra* note 65.

⁶⁷*Id.* at 149-62.

⁶⁸*Id.* at 149.

⁶⁹*Id.* at 157.

⁷⁰*Id.* at 149.

⁷¹*Id.* at 161.

The literature published since the Chicago Jury Project also points to the conclusion that lay jurors are competent to evaluate scientific evidence. The literature includes surveys of courtroom use of scientific evidence⁷² and simulated trials.⁷³ Let us first review the surveys of actual courtroom use. There are reported surveys of the use of polygraphy, psychiatry, and sound spectrography in the courtroom.

First, the polygraphy studies. We have reports from Massachusetts,⁷⁴ Michigan,⁷⁵ Utah,⁷⁶ Wisconsin,⁷⁷ and Canada.⁷⁸ The most recent publication is the most emphatic. It is an article published, not by a defense expert, but rather by Mr. Robert Peters of the Crime Laboratory Bureau, Wisconsin Department of Justice.⁷⁹ It is a survey of the experience with the use of polygraphy in Wisconsin.⁸⁰ His conclusions are even more powerfully phrased than those of the Chicago Jury Project. He states: "The actual trial results clearly support the belief that juries are capable of weighing and evaluating the

⁷²See, e.g., Peters, *A Survey of Polygraphic Evidence in Criminal Trials*, 68 A.B.A.J. 162 (1981); Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System*, 26 Hast. L.J. 917 (1975).

⁷³See e.g., Carlson, Pasano, & Tunnuzzo, *The Effect of Lie-Detector Evidence on Jury Deliberations: An Empirical Study*, 5 J. Pol. Sci. & Adm. 148 (1977); Cavoukian & Heslegrave, *The Admissibility of Polygraph Evidence in Court*, 4 Law & Hum. Behav. 117 (1980); Markwart & Lynch, *The Effect of Polygraph Evidence on Mock Jury Decision-Making*, 7 J. Pol. Sci. & Adm. 324 (1979).

⁷⁴In Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System*, 26 Hast. L.J. 917, 968 (1975), the author points out that in *Commonwealth v. George O. Ederly*, No. 95459, Middlesex Court, 1961, the jury acquitted a defendant although the judge admitted adverse polygraph testimony. The author also mentions the interviews of the jurors in *United States v. Grasso*, CR-79-179-LC (D. Mass. June 1973). *Id.* The interviews are summarized in Barnett, *How Does a Jury View Polygraph Results?*, 2 Polygraph 275 (1972).

⁷⁵*Id.* at n.258 (citing Transcript of Evidentiary Hearing at 32, *People v. Lazaros*, CR-6237 (Oakland County, Mich. Cir. June 23, 1970)).

⁷⁶*Id.* (citing *State v. Jenkins*, 523 P.2d 1232 (Utah 1974) (the jury convicted the defendant although the judge admitted polygraph testimony supporting the defendant's innocence)).

⁷⁷Peters, *A Survey of Polygraph Evidence in Criminal Trials*, 68 A.B.A.J. 161 (1982).

⁷⁸Cavoukian & Heslegrave, *The Admissibility of Polygraph Evidence in Court - Some Empirical Evidence*, 4 Law & Hum. Behav. 117 (1980).

⁷⁹See, e.g., Peters *supra* note 72, at 165. The author reviewed 11 Wisconsin trials in which polygraph evidence was admitted by stipulation of the parties. *Id.* at 164. Of the 19 lawyers involved in these cases who responded to the author's survey, 17 felt that the polygraph evidence was "reasonable and intelligible" and only four felt that the jury "disregarded significant evidence because of the polygraph testimony." *Id.* See also Barnett, *How Does a Jury View Polygraph Evidence*, 2 Polygraph 176 (1973). In interviews with eight jurors in a criminal trial at which polygraph evidence was used by the defense, the jury treated the evidence simply as "an additional piece of evidence." *Id.* at 277.

⁸⁰Peters, *supra* note 72, at 165.

evidence and rendering verdicts that may be inconsistent with the polygraph evidence . . . Polygraph evidence does not assume undue influence in the evidentiary scheme."⁸¹

Now, the psychiatry studies. It is clear that unless you have the sort of bizarre facts present in *Hinkley*, the jury exercises independence of mind. It frequently finds the defendant sane and guilty even though there is a wealth of defense psychiatric testimony that the accused was insane at the time of the *actus res*.⁸² Jurors often discount and disbelieve testimony by mental health professionals.

And finally, the sound spectrography surveys.⁸³ In one survey, it was discovered that the conviction rate in the cases where the prosecution relied on sound spectrography evidence was 11 percent lower than the normal conviction rate in those jurisdictions.⁸⁴ Thus, in each area, polygraph, psychiatry, and sound spectrography, there is evidence supporting a belief in the lay jury's capacity to evaluate scientific evidence.

In addition to the surveys of courtroom use, there are experimental simulations. First, we have two studies of polygraphy, one from Yale and one from Canada. In the Yale study, only 14.5 percent of the mock jurors reported that they thought the polygraph evidence was more significant than the lay testimony in the case.⁸⁵ The Canadian findings are even more striking.⁸⁶ Sixty-one percent of the mock jurors reported that they thought the polygraph testimony was less persuasive than the scientific evidence in the case. In the films of the mock jury deliberations, the jury spent little or no time talking about the polygraph evidence.

The psychiatry study is a follow-up to the Chicago Jury Project.⁸⁷ Most of the results of the Chicago Jury Project were reported in *The American Jury* by Kalven and Zeisel.⁸⁸ That report surveyed several hundred actual cases. One follow-up was a simulation of trials involv-

⁸¹*Id.*

⁸²Alexander, *Meeting the Insanity Defense*, in *The Prosecutor's Deskbook* 593 (1971).

⁸³Greene, *Voiceprint Identification: The Case in Favor of Admissibility*, 13 Am. Crim. L. Rev. 171 (1975). The author, an assistant U.S. Attorney for the District of Columbia, analyzed the experiment with sound spectrography and surveyed recent cases—appellate and trial level—involving the use of voice-identification evidence. *Id.* at 173-89.

⁸⁴*Id.* at 190-91. See also Note, *supra* note 13, at 766.

⁸⁵Carlson, Pasano and Tannuzzo, *supra* note 73, at 153.

⁸⁶Markwart and Lynch, *supra* note 73, at 333.

⁸⁷See R. Simon, *The Jury and the Defense of Insanity* (1967).

⁸⁸*Id.*

ing psychiatric evidence.⁸⁹ After interviewing both the psychiatrists who testified in the simulated trials and the jurors who sat in those simulations,⁹⁰ the researchers concluded, as they had in the earlier study, that the jury does understand the essence of the testimony and can effectively discriminate.⁹¹

Of course, it can be argued that polygraphy and psychiatry are atypical scientific techniques because they have received extensive adverse publicity. Perhaps they are the exception rather than the rule. Because of the adverse publicity to the two techniques, jurors are skeptical of that evidence. But for all other types of scientific evidence the jury may be in awe, as it has long been assumed. However, even that assumption is being called into question. In 1980, one of the leading American witness psychologists, Dr. Elizabeth Loftus, reported new research in the *Annals of the New York Academy of Science*.⁹² Her research was designed to test the weight that jurors attach to different kinds of evidence.

Dr. Loftus' hypothetical was a bad check case.⁹³ In one variation, the identification rested on eyewitness testimony, impeachable on the normal grounds (e.g. limited opportunity for observation and the distance between the alleged perpetrator and the observer). In the other variation, the identification rested upon high caliber scientific evidence including fingerprints.⁹⁴ Dr. Loftus found that the jury was more willing to convict on the basis of the lay testimony than on the basis of even the highest caliber scientific evidence.⁹⁵ The thing that we have overlooked for so long is the natural distrust of the unfamil-

⁸⁹*Id.* The mock juries were shown differing versions of two trials, one trial for housebreaking and the other for incest, in which the "defendant" pleaded not guilty by reason of insanity. *Id.* at 34-77. There were six different versions of the housebreaking trial, with variations in instructions (M'Naghten rule, Durham "product rule," and an "uninstructed" version) and variations in information concerning the defendant's commitment following trial. Each version was shown to five different juries. Thus, a total of 30 juries viewed some version of the housebreaking trial. There were also six different versions of the incest trial, each version having variations in the jury instructions and variations in the strength of a psychiatric testimony. The incest trial was shown to a total of 98 juries.

⁹⁰*Id.* at 85-86. Seventy-three percent of the jurors felt the psychiatric testimony was helpful; 67 percent felt that no further psychiatric testimony was necessary to aid them in their deliberations; and 77 percent believed that the testimony was not "too technical." *Id.* at 86.

⁹¹*Id.* at 217-18.

⁹²Loftus, *Psychological Aspects of Courtroom Testimony*, 347 *Annals of the New York Academy of Sciences* 27 (1980).

⁹³*Id.* at 32.

⁹⁴*Id.* at 34.

⁹⁵*Id.* See also, Taylor, *Reliability of Eyewitness Identification*, Criminal Defense, Sept.-Oct. 1982, at 7; Loftus and Monahan, *Trial by Data*, 35 *American Psychologist* 270, 276 (1980).

iar, here the scientific evidence. We may have underestimated the jurors' natural human tendency to doubt the unfamiliar.

This research has special significance for the military. Especially if you compare courts-martial with state trials, the court-martial is more likely to have better educated, sophisticated jurors. If we can have faith in a state trial jury, as suggested by the research to date, there is all the more reason to have faith in the court-martial panels that you present scientific evidence to.

Conclusion

In conclusion, it would be foolish at this point to leap to any conclusion; it would be premature to make a definitive decision to abandon *Frye*. However, we must continue the empirical research into the lay jurors' ability to evaluate scientific evidence. The most important point that Kalven and Zeisel make is that this is not a question that can be answered *a priori*.⁹⁶ We must investigate the question rather than simply voicing our bias and prejudice. The scientific community has a perfect right to charge that the legal community has been biased and unscientific in our treatment of the issue. Rather than investigating it empirically, we have simply proceeded on the unexamined assumption that lay juries cannot critically evaluate the evidence.

I am so glad that the members of the Court of Military Appeals are here today. I would be delighted if in the next oral argument in which a counsel invokes *Frye*, the judges turn to that counsel and say: Counsel, we understand that you believe that a lay jury cannot critically evaluate scientific evidence. However, is that simply your assumption, or is there concrete evidence to support that belief? To date, I have not found hard empirical research supporting that belief.

This is a topic of far-reaching libertarian and democratic implications. When a defendant's liberty is at stake, how tolerant can we be of evidence that is prone to error? In a democratic system in which lay jurors make critical decisions, how much faith can we have in these people who have no background in the scientific disciplines which come into play in trials and courts-martial?

If the assumption is correct that lay jurors are not up to this task, we are going to face a cruel choice. In effect we will have pitted liberty against democracy. On this assumption, we can maximize the protection of the defendant's liberty only by restricting the jury, and

⁹⁶H. Kalven & H. Zeisel, *supra* note 65, at 151.

can preserve the institution of the jury only at the cost of wrongful convictions and inaccurate fact-finding. But we do not have to face that choice if the preliminary indications of the lay juror's competence prove true.⁹⁷

Thomas Campbell once wrote that the message of science is despair.⁹⁸ His fear was that the empiricism of science would inevitably erode our belief in all intangible values. Perhaps Campbell was wrong. Perhaps science is not going to erode the intangible values of the democratic jury. It may be that empirical investigation will restore our belief in that institution and gives us new hope. The question that I want the court to consider and that I want everyone in this room to think about, is the extent that we can have faith in the lay jury's ability to evaluate scientific evidence. If we reach the hopeful conclusion that the jury has that capability, we can retain our democratic institutions and yet have reliable fact-finding. If we come to that conclusion, it will be time to jettison the *Frye* test; it will be time to end the discrimination against scientific evidence in the United States.⁹⁹

⁹⁷Austin, *Jury Perceptions on Advocacy: A Case Study*, Litigation, Summer 1982, at 16 (In an antitrust case involving a good deal of expert testimony about economics and electronics, the jurors were "skeptical of the experts"); Younger, *A Practical Approach to the Use of Expert Testimony*, 31 Cleve. St. L. Rev. 1, 39, 40 (1982) ("In my experience, the jury does a very good job of assessing the credibility of an expert." "[J]urors are eminently capable of weighing qualifications, of weighing one expert's qualifications against another's.")

⁹⁸*Pleasures of Hope*, Part II, line 325.

⁹⁹See McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 Iowa L. Rev. 879 (1982).

THE STATUS OF THE LEGAL ADVISER TO THE ARMED FORCES: HIS FUNCTIONS AND POWERS*

By Brigadier General Dov Shefi**

I. PREFACE

The necessity for the armed forces to have access to legal advice both in wartime and in peace, regarding the application of the laws of war, stems from a number of different causes.

First, the prolific development of the laws of warfare since the Geneva Convention of 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field and their great complexity require study, guidance, and a considerable degree of expertise. This is so particularly since the laws of war as a whole are not always clear or acceptable to all nations in the same degree, since they consist partly of rules of customary international law and partly of conventional rules which only bind states which are parties to the particular convention concerned.

Secondly, in addition to this lack of clarity in the laws of war, the defense of obedience to superior orders has been drastically curtailed. Only in very exceptional cases will a soldier who has committed a breach of the laws of war be able to rely on the plea that obedience to an order of commander or superior should exempt the soldier from responsibility for his or her actions. The soldier, under

* The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of the Judge Advocate General's School, the Department of the Army, any other agency of the United States government, or any governmental agency of the State of Israel.

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the modern concept of the laws of war, is no longer a robot, but is required to exercise the requisite knowledge and judgment, so as to distinguish lawful from unlawful orders.

Thirdly, under battle conditions, the soldier is usually more preoccupied in fulfilling the task of insuring military success than in carrying out the law and complying with the rules of land warfare including international humanitarian law.¹

It is in the preservation of the delicate balance between the requirements of the army and compliance with humanitarian law applicable in wartime, and in insuring awareness by combatants of the laws of warfare covering hundreds of rules, that the legal adviser has a vital function.

The necessity for legal advice for the purposes of issuing orders, and for instruction and propagation of the laws of warfare was impliedly recognized in the 1907 Hague Conventions and the 1949 Geneva Conventions. The obligation to appoint a legal adviser to the armed forces was specifically imposed by Section 82 of the First Protocol of 1977 to the Geneva Conventions.

11. INTERNATIONAL CONVENTIONS

Article I of the Hague Convention on the Laws and Customs of War on Land, 1907, imposes an obligation on the contracting powers to issue instructions to their armed forces in accordance with the Regulations respecting the Laws and Customs of War on Land annexed to the Convention. This provision of the Convention reads as follows: "The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention".

A provision in the same vein is to be found in Article 26 of the Geneva Convention regarding the Amelioration of the Condition of Soldiers Wounded in Armies in the Field, 1906. This not only imposes the obligation to issue appropriate instructions, but also to take necessary measures to acquaint military personnel with such instructions, with the object of bringing them to the notice of the individual. In the words of the Article: "The signatory governments shall take the necessary steps to acquaint their troops, and particu-

¹Green, *The Role of Legal Adviser in the Armed Forces*, 7 Int'l Y.B. of Human Rights, 154, 155 (1977).

larly the protected personnel with the provisions of this Convention and to make them known to the people at large.”²

The four Geneva Conventions of 1949 add further detail to the provisions of Article 26 of the 1906 Convention, by imposing an obligation to include the provisions of the Convention in programs of military instruction and, for the first time, requiring their inclusion as far as possible in programs of civilian instruction. The object of these requirements is to disseminate information concerning those provisions as widely as possible and to bring them to the notice of the entire population, both civilian and military. Article 47 of the Geneva Convention of 1949 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field provides:

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and in particular to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.³

Article 83 of the First Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, 1977, does not make any essential change in what is provided in the Geneva Conventions themselves regarding the dissemination of and instruction in those Conventions. This Article provides:

(1) The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Convention and the Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population: so that those instruments may

²See also identical text in Article 27 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 1929.

³The identical provision appears in Article 48 in the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, in Article 127 of the Geneva Convention relative to the Treatment of Prisoners of War, 1949, and in Article 144 of the Geneva Convention for the Protection of Civilian Persons in Time of War, 1949. In the Third and Fourth Geneva Conventions, a provision has been added whereby the military or other authority that undertakes responsibility for prisoners of war or for protected persons, under the Fourth Convention, must have access to the text of the Convention and receive instruction in its provisions.

become known to the armed forces and to the civilian population.

- (2) Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and their Protocol shall be fully acquainted with the text thereof.

111. PRACTICE: DISSEMINATION

The above provisions of the Hague and Geneva Conventions have been applied by various states in different ways, such as the publication of the laws of war in manuals, preparation of teaching programs, advice to commanders as to dissemination and instruction, and advice on operative and tactical matters.⁴

For example, the British War Office has published the Manual of Military Law, Part 111, The Law of War on Land, 1958, consisting of the various Conventions on the laws of war with explanatory notes. Similarly, the land, air, and naval forces of the United States have published manuals on the laws of war, the best known being Field Manual No. 27-10, The Law of Land Warfare, 1956. Likewise, in Israel, there was published in 1956, by the Military Advocate's Office, a Guide for Legal Officers serving on the Military Government of administered territories, intended for legal advisers in these territories.

In Israel, dissemination of the laws of war is also effected by the General Staff of the Army by means of guidebooks and pamphlets. Among some of the relevant documents are the Order of the General Staff No. 33.0133, entitled "Discipline-Conduct in Accordance with International Conventions to which Israel is a Party". This order imposes a duty on Israeli soldiers to obey the provisions of the four Geneva Conventions of 1949 and the Hague Convention of 1954 for the Protection of Cultural Property in the event of Armed Conflict. The text of these Conventions appears in the Military Code compilation No. 17-24 which is distributed to every unit. Moreover, in Standing Orders 38.0107, 38.0108, 38.0110, 38.0111 and 38.0122, instructions are laid down regarding the implementation of the Geneva Convention relative to the Treatment of Prisoners of War. Instructions regarding the capture of loot and seizure of enemy

⁴The enforcement of the laws of war is part of the function of the legal adviser. Nevertheless, where a soldier is found in breach of the laws of war, he or she is tried by the state of which that soldier is a citizen under its national law, and not under international law. Therefore, it is the military prosecutor who prepares the criminal file and the charges are in respect of offenses under the Military Justice Act.

property are detailed in Standing Orders 50.0301, 50.0302 and 50.030. These are based on the laws of war.

The texts of Conventions to which Israel is not a party, but which are binding upon her as constituting customary international law, appear in the Collection of Conventions on the Laws of War, reference No. HP/17-20: The following conventions, *inter alia*, are the Hague Convention (No. IX) of 1907 respecting Bombardment by Naval Forces in Time of War, the Hague Convention (No. IV) respecting the Laws and Customs of War on Land, 1907, including the Regulations annexed thereto, the Hague Declaration of 1899 prohibiting the use of projectiles diffusing asphyxiating or deleterious gases, and the Hague Declaration of 1899 prohibiting the use of bullets which expand or flatten easily in the human body.

In addition to the publication of collection of conventions, the General Staff and the Advocate-General's Department have issued various manuals on the laws of war. These include "The Laws of War," HZ/17-2, consisting of a survey of the principles of the laws of war, laws of land, sea and air combat, protection of the wounded and sick on the battlefield and protection of prisoners of war; "The Powers of the Army in Occupied Territory," HZ/17-28, including chapters on the occupation of enemy territory, the status of such territory, its administration, powers of military government, public administration and private property; and "The Protection of Cultural Property in the Event of Armed Conflict," a pamphlet issued by the Military Advocate-General's Department.

In addition to the above, the Army authorities are particularly careful to insure that, in accordance with the spirit of Article 127 of the third Geneva Convention, the military police should keep in all places of detention for prisoners copies of the Geneva Convention relative to the Treatment of Prisoners of War together with instructions of the Military Police Headquarters which also include the provisions of the Convention. Moreover, in accordance with Article 144 of the Fourth Geneva Convention, copies of that Convention are also kept by the legal advisers to the headquarters of units in the areas administered by the army.

IV. INSTRUCTION AND COURSES

First, it should be mentioned that Section 178(2) of the Military Justice Law provides that the Military Advocate-General is to supervise the enforcement of the rule of law in the Army. Moreover, Section 178(5) of that Law requires that he should fulfill any other function assigned to him by any law or by Army orders. By virtue of these two provisions, the Military Advocate-General and his staff are

engaged in instruction in legal matters generally and in particular the law relating to the functioning of the army in war and in peace.

The Military Advocate General's Department has placed special emphasis on instruction in the laws of war and in the powers of the army in occupied territories, particularly since 1961. Instruction in the laws of war through courses and training is now considered the most important and efficient means of disseminating knowledge in this field among the armed forces. The legal adviser has a considerable function in instruction and planning of courses of study, both on the theoretical plane, such as delivering lectures and theoretical instruction, and on the practical plane, by practical application of the subjects studied.

Every six months, the Army holds courses, arranged by the Military Advocate General's Department, on the laws of war and the powers of the army in occupied territories. In these courses, the Hague and Geneva Conventions are studied, as well as the two additional protocols of 1977 to the Geneva Convention, although Israel has not signed them. This series of courses is intended for lawyers in the regular and reserve forces and its aim is to train lawyers to serve as legal advisers, judges, and military prosecutors in areas occupied by the Army.

Lectures on the laws of war are also integrated into the programs of various other army courses, such as officers' courses, staff officers' courses, military police investigators' courses, medical officers' courses and courses in the Staff College.

The dissemination of knowledge of the laws of war among the general population is effected through university courses, which include a course in military law given by the Military Advocate General. This course includes a section on the laws of war and military occupation.

On the practical level, the legal adviser takes an active part in emergency exercises carried out by various branches of the army. For example, the General Staff from time to time holds an exercise in which all the units responsible for prisoners of war, such as those responsible for reception of prisoners, their transfer, conditions of detention, and hospitalization, participate. The main task of the legal adviser in such exercises is to prepare problems likely to arise in wartime which require instant solution by any one of the authorities taking part in the exercise.

V. ADVICE

Advice to the General Staff on the laws of war is in practice the most important task of the legal adviser. Such advice is usually provided on the basis of the continuous contact with the General Staff and by associating the legal adviser in the process of decision-making. This complements to a considerable extent the other methods of disseminating information, such as courses on the laws of war. Legal advice can be provided in various ways, as, for example, by legal opinion on the question of the use of certain weapons, the status of civilians taking part in hostile operations, and immunities of certain bodies or of certain targets in time of war.

As a result of changing conceptions, there is now a greater awareness in military circles of the fact that every military activity has its legal aspects which need to be clarified with the aid of lawyers. Consequently, resort to legal advisers by the General Staff is becoming more widespread. At the same time, the legal adviser must appreciate the mentality and military requirements of the commander to whom advice is given. The attorney must serve as an adviser only; the final decision being in every instance the absolute responsibility of the military commander, who has to weigh a number of varying factors of which the legal factor is only one.⁵

The task of giving legal advice to the Army authorities in international law, including the laws of war, devolves upon the Military Advocate General under section 178(1) of the Military Justice Law 1955, which provides that the Military Advocate General is the adviser of the Chief of the General Staff in all legal matters. In 1968, an International Law Division was established within the Military Advocate General's Department. This division is responsible for assisting the Army on all matters relating to international law. Since its foundation, it has in practice also been obliged to assist government departments, and in particular their legal advisers, on matters relating to the rule of law in occupied territories. The Division gives legal advice on current matters to the Ministry of Defence and the Coordinator of Activities in the Administered Territories and coordinates the work of the legal advisers in these territories. It is also responsible for preparing material for courses on the laws of war and for a manual on that subject for the use of the Army as a whole.

⁵See Parks, *The Law of War Adviser*, Revue de Droit Penal Militaire et de Droit de la Guerre (XVIII-4) 357, 371-72 (1979).

As part of its assistance to various departments of the Army, the Division prepares legal opinions and gives advice on current matters in fields such as the Arab-Israel conflict, settlements with Arab countries, and advice to the navy on the law of the sea and to the air force on international matters of concern to it. Furthermore, the International Law Division also gives legal advice on the relations between the Army and the Defence Establishment on the one hand and the United Nations Forces in the Middle East *i.e.*, UNEF, UNDOF, UNTSO, UNIFIL, as well as on their relations with the Red Cross.

Within the scope of its advice to the various departments of the Army, the Division drafts proclamations and orders issued by regional commanders and supervises their implementation. The Division drafts orders of the General Staff and internal instructions in the Army connected with international law and the laws of war. The Division is a party to discussions on determining policy as well as drafting, so as to ensure the drafting of clear, intelligible, and lawful orders, which, are consistent with Israel's international obligations.⁶

In addition to giving legal advice on current matters, the International Law Division participates in preparing the viewpoint of the Army and the Defence Establishment at international conferences, such as the conference for international humanitarian law, the conference on the use of weapons and the conference on the law of the sea. It should be mentioned here that, in preparation for a number of these conferences, the Military Advocate General had summoned all Army authorities interested in the topic of the particular Convention or on the agenda of the conference, in order to give advice, clarify the provisions of the Convention, and determine an overall Army policy towards it.

VI, THE OBLIGATION UNDER THE FIRST PROTOCOL TO ADOPT A LEGAL ADVISER

Article 82 of the First Protocol relating to the Protection of Victims of International Armed Conflicts 1977 imposes an obligation on the contracting parties at all times, and on parties to an armed conflict in wartime, to insure that a legal adviser should advise military commanders, as far as necessary, in the application of the Geneva Conventions and the Protocol thereto and on instructions to

⁶On this subject, the intention is to focus mainly on orders relating to military activity, connection with foreign organization such as the United Nations and the Red Cross, and, as detailed below, all matters connected with the administration by the Army of administered territories.

the fighting forces under the Conventions. In the words of the Article:

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and the appropriate instructions to be given to the armed forces on this subject.

To a certain extent, Article 82 confirms existing practice regarding the involvement of the legal adviser in instruction and dissemination of the laws of war. However, the Article has two novel aspects. First, the Article imposes an obligation on states to insure that legal advice is provided to the fighting forces in peacetime, and, more particularly, in wartime. Secondly, the nature of the obligation is significant, *i.e.*, it is not only a question of instruction and dissemination of information but also of concern for enforcement of the Conventions and the Protocol by the fighting forces in wartime.

The wording of Article 82 represents, to a certain extent, a compromise between the draft put forward by the committee of experts in 1973 and the positions of the various governments as reflected in the diplomatic conference for the development and reaffirmation of international humanitarian law applicable to armed conflicts. The states that had participated in the latter conference had refused to take upon themselves the absolute obligation to employ a legal adviser to the military commanders whose function should be to advise on the application of the Conventions and Protocol and insure that proper instructions should be given in connection therewith. Instead, the wording that was accepted imposed an obligation to insure that there should be a legal adviser available "when necessary," not necessarily at the disposal of the commanders, but at the discretion of the state at "the appropriate level", and also that the legal adviser should merely *advise* the various military levels as to the application of the Conventions and Protocol and as to appropriate instructions to be given thereon, but not that the adviser would be obliged to insure the *issue* of appropriate instructions.⁷

Thus, it would seem that despite innovations in the article, it still reflects the classic conception whereby the legal adviser should advise only when requested and as far as necessary, on the level

⁷On the difference between the draft and the final text, see Draper, *Role of Legal Advisers in Armed Forces*, Int'l Rev. of the Red Cross, Jan.-Feb. 1978, at 6, 9-10.

considered appropriate, and his task is to be confined to advice only, thus excluding any inquiry into the enforcement of his advice or the issue of appropriate instructions.⁸

VII. THE FUNCTION OF THE LEGAL ADVISER AND HIS STATUS UNDER THE FIRST PROTOCOL

The main function of the legal adviser under the Protocol is to advise the commander as to the application of the Conventions and the Protocol, and in particular, advise on all matters mentioned in Parts III and IV of the Protocol, *i.e.* methods and means of warfare, status of combatants, and protection of prisoners of war and of the civilian population. The drafters of the Protocol intended in this way to insure that the legal adviser plays a role in the course of hostilities by giving continuous legal advice to the field commander as to the legality of any order or operational instruction. In order to achieve this objective, which, because of the nature of war is still in the realm of the ideal rather than an enforceable provision of the existing law, the ground must be prepared in peacetime and the legal adviser must be integrated into the various military levels on a continuous and permanent basis and into the decisionmaking process.

VIII. THE INTEGRATION OF THE LEGAL ADVISER IN PEACETIME

The ground work for the participation of the legal adviser in operational decisions in wartime must be prepared in peacetime. A prerequisite for this is the existence of an appropriate institution for legal advice and efficient channels and methods of work. At a minimum, this framework should include the existence of a comprehensive professional legal staff, mutual relationship, on a continuous and permanent basis, between the legal staff and the Army authorities, and continuous efforts to ensure awareness by the Army authorities of the need to take advice.

⁸The particular wording of Section 82, distinguishing as it does between "States parties," who are obliged to employ a legal adviser continuously, and "parties to a conflict", who undertake to employ a legal adviser only in wartime, is intended to insure that this obligation should also be imposed on national liberation movements, which, under Articles 1(4) and 96(3) of the First Protocol, are regarded as parties to the Protocol, by virtue of the declaration that they undertake to comply with the obligations under the Convention, not by virtue by signing it.

In this context, the problem of lack of reciprocity in the application of the Protocol arises, *i.e.*, to what extent will such movements make use of the services of a legal adviser, where such legal adviser will be trained, and to which Army ranks he or she will give advice. Moreover, this problem of lack of reciprocity is characteristic of the whole Protocol, not just of this particular provision.

This can be achieved by dissemination of explanatory literature and increasing the distribution of opinions on matters of principle, as well as constant readiness to give effective legal advice.

At the same time, it is important to accustom military commanders of all ranks to the presence of the legal adviser and the need for legal services in peacetime, so that this connection should not be interrupted in the transition to wartime conditions.

So as to make the necessary preparations for maximum integration of the legal adviser as proposed above, the legal adviser will have to contend with certain problems. As already mentioned, the military commander at every level has to weigh a number of relevant factors, apart from the legal factor. Therefore, theoretically, the commander may disregard the advice of the legal adviser and make decisions contrary thereto, giving preference to military factors which might bring speedy and decisive victory, rather than to legal and humanitarian considerations. In such a case, the legal adviser will have to exercise the full weight of his or her authority and make use of all available effective methods of protest, so as to induce the military commander to take the legal factor into consideration. To this end, the legal adviser must, on the one hand, show considerable knowledge and expertise in the laws of war and the ability to distinguish between the ideal and the existing law. On the other hand, the legal adviser must try to appreciate the military commander's way of thinking and the objects and military factors confronting the commander. The legal adviser will have to acquire knowledge not only of international law, but at times also logistic and technical knowledge, so as to contend successfully with the task of preserving the delicate balance between military and humanitarian considerations. For this reason, efforts should be made to give the legal adviser military training, so as to keep the adviser abreast with reality.

Furthermore, the legal adviser must exercise a degree of discretion and combine political sense in no small measure with legal advice. "The law of war adviser thus must be prepared not only to state what the law is, but to show the tactical and political soundness of his interpretation of the law."⁹

Considerable importance attaches to the location of the legal adviser in the military hierarchy in peacetime. To bear the burden of the tasks imposed upon the adviser in peacetime in preparation for wartime, it is desirable for the legal adviser to be a staff officer and to head a legal division or department, staffed by career officers. This

⁹Parks, *supra* note 5, at 385.

division should be separate from and not subordinate to the military level to which it gives advice, thus ensuring its independence in providing legal advice.

The question of the legal adviser's independent status arises principally because the adviser's military rank will be usually lower than that of the commander to whom advice is given and the risk that, because of this difference in ranks, the commander will tend to belittle or ignore such advice or, worse still, to subordinate the legal adviser to his or her authority. It should be stressed that, in Army orders, the military advocate has a special status. The advocate is the only professional officer in the headquarters who, both from the point of view of command and professionally, is subordinate to the Military Advocate General, even when physically assigned to a headquarters unit or to a corps. This is in order to preserve the advocate's independence when enforcing the law or giving legal opinions. The advancement of a military advocate is dependent solely on the decision of the Military Advocate General and not upon the commander of the headquarters unit or corps.

Since the Six Day War, when the Army was charged with the task of controlling the administered territories, the Military Advocate's office has been concerned with legal advice, legislation, judicial functions, and prosecution. The independent status accorded to the military advocate is also recognized with regard to the legal functions in the administered territories, in respect of which the advocate is subordinate only to the Military Advocate General. A combination of all the factors detailed above, *i.e.* independence from the commander, expertise in international law, understanding for the mentality of the military commander and of the varying military factors facing the commander creating direct contact with the commander on a permanent basis, and the association of the legal adviser with the decisionary and planning levels, will insure that, in wartime, the legal advisers' presence will be felt, expressing itself in the legality of the orders issued.

IX. THE INTEGRATION OF THE LEGAL ADVISER IN WARTIME

The exact nature of the cooperation between the legal adviser and the combatant forces is still not clear. It is clear that the intention is not that the adviser should actually take part in combat on the front line. It is therefore reasonable to assume that the legal adviser can assist in solving problems arising in the field even from his or her position in the rear. This method will be effective, not only because today's sophisticated means of communication enable orders and

advice to be given immediately over a wide area, but mainly because the operative guidelines are issued in effect before the forces go out to battle; all that will be required during actual combat, if at all, will be clarification of existing guidelines.

Article 82 of the First Protocol deals with the legal adviser in wartime, but does not exclude a situation of continuing hostilities, in which fighting has ended but territory remains occupied by the other side. This situation of the occupation of territory under Military Government is unique to Israel. It is therefore appropriate to consider the structure of legal advice in territories administered by the Israeli Army.

It will be recalled that the Six Day War, in the course of which Israeli forces conquered the Golan Heights, Judea and Samaria, the Gaza Strip and Sinai, was preceded by a waiting period of about three weeks. This enabled all units, including the Military Advocate General's Department, to prepare an emergency set-up which included courses in international law and the laws of war and the preparation of legal material in special emergency containers.¹⁰ These containers were intended to accompany the legal adviser attached to forces in the field, so as to enable legal advice to be given to the fighting force in wartime and, thereafter, if and when the area should become occupied territory. Thus, for example, on 6 June 1967, legal advisers were attached to the force detailed to fight in the Jenin area. They took the emergency containers with them, and, on the surrender of the town, took up positions in a Jordanian army camp which had been converted into the brigade's headquarters. At that stage, the legal advisers took part in discussions of the staff of the unit headquarters, sharing in decisions concerning the confiscation and collection of weapons, curfew orders, the attitude to prisoners of war in special cases, such as the case of a group of Jordanian soldiers

¹⁰ Among the items to be found in emergency containers are legal literature, such as M. Greenspan, *The Modern Law of Land Warfare* (1959), G. Von Glahn, *The Occupation of Enemy Territory* (1957), the four Geneva Conventions of 1949, a collection of conventions on the laws of war, including the Hague Convention of 1907 and its regulations, a guide to the laws of war, a guide to the powers of the Army in the occupied territory, relevant orders of the general staff, proclamations, and basic orders, such as the proclamation as to the taking over of the government by the Army, and the order prohibiting acts of looting.

In view of the experience of the Six Day War, it was decided that, for reasons of convenience, the legal adviser should carry only an emergency kit with the main part of the legal material, whereas the container would arrive after the legal adviser had organized matters. The emergency kit contains, *inter alia*, a collection of Conventions on the laws of war, a manual of the laws of war, a manual for the officer in occupied territory, a booklet detailing the powers of the Army in occupied territory, and the 4 Geneva Conventions and relevant orders of the General Staff.

disguised and found in a hospital by Israeli soldiers, and many other matters.

The legal advisers who thus entered with the combatant force were also obliged to prepare the ground work for the military government organization until the arrival of additional legal personnel. They had to contend with the problem of relations with the population of the occupied areas, with classifying property for purposes of confiscation, careful recording of confiscated property, proclaiming curfews, and the issue of preliminary orders. At the same time, the process of setting up military courts in the administered territories was started. Similar challenges faced other legal personnel accompanying the forces in the Gaza Strip and El Arish.

A special situation existed in the Golan Heights. On the entry of Israeli forces into the region, which was sparsely populated and mainly rural in character, no legal books could be found, nor were there any local lawyers who could assist in ascertaining Syrian law. The legal advisers were therefore obliged to create a system of justice out of a legal vacuum. The first steps they took were to assemble abandoned property and record it as to prevent looting by civilians or soldiers, protection of the holy places—every village having its mosque or other holy site, and, at the same time, creation of contacts with the local Druze population which, in the main, was friendly towards the Israel Army.

Today, after fifteen years of Israeli control of the administered territories, the legal advisers, who are regular army officers, operate in conjunction with the area commanders. They are professionally subordinate, however, to the International Law Division at the General Staff. As mentioned above, their principal function is to give legal advice to the area commander and to the officers of the military government and the civil administration. Such counsel includes legal advice on military matters, such as closing of areas, supervision orders, and censorship and on civilian matters such as problems of education, water resources, electricity, agriculture, and industry. The adviser prepares draft orders constituting new legislation or amendments of existing legislation within the limits of the military government's powers under the Hague Rules and the Geneva Conventions. The preparation of orders is carried out in conjunction with International Law Division, and, after approval by the Coordinator of Activities in the Territories, the legislation is promulgated in the areas concerned in Arabic and Hebrew. The legal adviser is also responsible for issuing administrative orders, deportation orders, requisition orders, and orders for seizure of land and closure of areas. Additionally, the adviser may perform research into local law and

translation of local laws and regulations. This work is of great importance for administration of the area under local law and also for the purpose of promulgating orders on civilian matters to complement that law. The legal adviser prepares background material in the event of a petition to the High Court of Justice against a military commander, thus assisting the state attorney's office that represents the state before the High Court. In this matter, it should be pointed out that making the High Court of Justice of Israel available for applications originating from administered territories and against state authorities is without precedent in such situations. This procedure was made possible due to the policy of the State Attorney's office of not raising objections to the jurisdiction, so as to allow the local residents of the areas to receive additional relief against the military government authorities.

The legal adviser is responsible for military prosecutions in the territories. Furthermore, the legal adviser represents the military government before the appeals committee for claims, under the Order establishing such committees. This applies to appeals against decisions of government authorities specified in the annex to the Order or in an order of the area commander, such as various decisions of the Customs Staff Officer, a claim for damages for confiscation by a competent authority, or unlawful eviction of a possessor of land subject to an order as to registration of certain land transactions. The legal adviser also participates in committees set up by law or by defense enactments, such as the supreme planning council of Judea and Samaria, the pensions committee, or committees for appointment of prosecutors and judges.

X. SUMMARY

This survey has covered only some of the functions performed by the legal adviser, yet shows the variety of matters with which the adviser should be concerned and how far the legal adviser has become an integral part of the military organization.

In peacetime, the adviser is mostly engaged in giving advice to Army authorities on problems which raise various aspects of international law, in preparing and disseminating legal literature and organizing courses and instructing army units.

In wartime, the legal adviser assists in the solution of legal problems confronting the fighting forces, as shown in the experience of the Six Day War in Judea and Samaria, some ten years before Article 82 of the First Protocol came into force. Today, the legal

adviser in the administered territories is on the headquarters staff in each area.¹¹

¹¹In the Yom Kippur War, the lawyers who were reserve officers in the Military Advocate General's Office were mobilized in order to assist soldiers during the period after the fighting. These officers were actually welfare officers subordinated professionally to the Military Advocate General's Office. Their function was to assist in solving the personal problems of soldiers remaining in the front line after the fighting was over, such as extension of time for paying debts, refund of mortgage payments, payment of checks, and similar problems.

THE FREEDOM OF CIVILIANS OF ENEMY NATIONALITY TO DEPART FROM TERRITORY CONTROLLED BY A HOSTILE BELLIGERENT*

by Dr. Walter L. Williams, Jr.**

I. INTRODUCTION

The progressive development of international law pertaining to protection of civilians in armed conflict continues to be a matter of significant interest to military lawyers and legal scholars. This article addresses an important aspect of that subject, the freedom of civilians of enemy nationality to depart from territory controlled by a hostile belligerent. Neither diplomatic discourse nor legal literature has focused on this topic in recent times. However, terminating hostile belligerent control over civilians at the earliest practicable time has always been highly relevant to the humanitarian objective of protecting civilians in time of war. This is increasingly so in the context of modern armed conflict. In dealing with this quite substantial topic, this article assuredly does not present a full appraisal of the many questions involved. The discussion offers an impressionistic, exploratory inquiry only into certain issues and encourages future dialogue and contribution in developing definitive analysis useful both for governmental advisors and legal scholars. In keeping with the aims of the law pertaining to protection of civilians in armed conflict, the observational perspective is that of a citizen of the world community recommending to decision-makers policies reflecting community aspirations and appropriate rules calculated to more effectively implement those policies.

*The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental entity.

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The methodology¹ underlying this presentation emphasizes three aspects. The first is a requirement for comprehensive factual analysis of any particular instance of armed conflict. This analysis is contextual, viewing that conflict within the context of the existing global process of power in which states interact by various strategies to secure and maintain effective power positions in their relations. The second aspect is trend analysis of the course of legal decision concerning the right of civilians of enemy nationality to depart from territory controlled by a hostile belligerent. This is an analysis that, as regards past trends, properly considers the present and future effects of new conditions pertinent to the conduct of modern armed conflicts. The third aspect is a policy-oriented analysis of trends of legal decision, an appraisal of trends in light of advocated world community policies seeking the maximum protection of enemy civilians in modern armed conflicts. It is suggested that only through such a methodology may one expect accurately to determine the present developments in the rules pertaining to the freedom of movement of enemy civilians, to project those developments into the future, and to appraise the consequences of those developments.

II. THE CONTEXT OF MODERN ARMED CONFLICT: INCREASED RISKS TO ENEMY CIVILIANS

A. INCREASING RESORT TO ARMED FORCE

In addressing the subject of the freedom of enemy civilians to depart from territory controlled by a hostile belligerent, the first proposition is that, unfortunately, the foreseeable trend in international relations suggests that armed conflict situations placing civilians in grave risk will occur with increasing frequency. The trend over the last twenty years has been one of steady erosion of legal constraints on the use of armed force in international relations. Increasingly, prohibitions embodied in the United Nations Charter, other conventions, and customary international law receive lip service or are ignored. United Nations Security Council decisions and orders rendered under supposedly controlling authority of Chapter

¹A concise discussion of the methodology used in this article is presented in McDougal, Lasswell, & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 Va. J. Int'l L. 188 (1963), and McDougal, *Jurisprudence for a Free Society*, 1 Ga. L. Rev. 1 (1966). Detailed application of this approach is illustrated in M. McDougal & F. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961). European readers will find a discussion in McDougal, *International Law, Power, and Policy: A Contemporary Conception*, 82 Hague Recueil des Cours 137 (1953).

Seven of the Charter frequently are viewed, at best, as recommendations or else are simply disregarded or even derided by some states. Despite the lessons of two world wars and bloody regional and binational struggles of this century, many states today seem bent on "national tribalism", enthusiastically bashing their neighbors with modern "war clubs" of sophisticated weaponry. To paraphrase the Irish poet Yeats, the "center" simply is not holding. To chart even the more salient points of this trend or to analyze the various explanatory factors is beyond the scope of this discussion. It is merely noted that this increasing trend to resort to unilateral use of armed force for both aggressive and defensive objectives occurs in the context of continued absence throughout the world community of the will to establish strong global and regional community agencies possessing the authority and the means to deter or to terminate impermissible uses of armed force in international relations. The bloody war between Iran and Iraq, the "serial" conflicts in Arab-Israeli relations, tragically evidenced recently in Lebanon, the spreading pattern of transborder violence in Central America, the recent Argentine-British conflict over the Falklands, and the continuing Soviet violence in Afghanistan are merely more notorious instances of this trend. This is already a bleak picture, but it is suggested that this is merely the early stage of a still more precipitous descent of much of the world down the deadly slope of death and destruction resulting from modern armed conflict.

Consequently, the increasing number of instances of armed conflict necessarily will subject great numbers of civilians to risks of death, injury, and other deprivations. Thus, the maximum development of and adherence to the rules of armed conflict pertaining to protection of civilians, including the principle of freedom of enemy civilians to depart from territory controlled by a hostile belligerent, become every more compelling.

B. SPECIFIC ADVERSE FACTORS IN MODERN ARMED CONFLICTS

Concurrently, as the tragic increase in international armed conflict brings grave risks to larger numbers of civilians, certain features of present and future conflicts suggest that the *intensity* of those risks likewise will increase. Briefly and with primary focus on enemy civilians present in territory controlled by a hostile belligerent, some of those adverse factors will be discussed.

1. Development in Modern Weaponry and the Problem of Movement Within Territory Controlled by a Hostile Belligerent

a. Development in Modern Weaponry

One important factor is the dynamic developments in military weaponry. With the enormously increased destructive range and speed of modern weapon systems, the risks to civilians in or in the proximity of target areas have increased enormously. Even if sufficient time exists to relocate civilians, and time often will be insufficient, the security of rear areas of combat zones or other locations may be most illusory. The fluidity of modern combat and the consequences of human or mechanical error in use of weapon systems may substantially endanger civilians relocated to supposedly safer areas. Especially for smaller states, the entirety of national territory may constitute one large combat zone.

b. Movement Within Territory Controlled by a Hostile Belligerent

With this expectation that civilians will encounter increasing difficulty in avoiding damage from modern military weaponry, the extent to which the humanitarian law of armed conflict requires hostile belligerents to relocate enemy civilians to safer areas or to permit them to move to safer areas should be examined. In appraising the situation of enemy civilians present in territory controlled by a hostile belligerent, two categories are considered: those who are in the hostile belligerent's own territory and those in territory occupied by the hostile belligerent. As regards the first group, the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War² ("Civilian Convention") presently offers meager legal protection from exposure to modern weaponry. If a hostile belligerent has refused to permit enemy civilians to depart from its territory, the Civilian Convention does not require the Detaining Power to relocate those civilians to a particularly safe location. As regards internees, enemy civilians held under close custody of the Detaining Power, the duty of the Detaining Power is merely to avoid the placement internment camps in areas "*particularly exposed* to the dangers of war."³ The difference between the negative duty not to set up an internment camp in close proximity to a military target and the affirmative duty to place internees in a particularly safe location, such as many miles from the anticipated zone of conflict, is self-evident. As regards enemy civilians not interned but still not allowed to depart from the belligerent's territory, the Civilian Convention

²6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (12 Aug. 1949).

³Civilian Convention, Art. 83.

provides no duty of safe location whatsoever beyond “national treatment.” If enemy civilians reside in an area “*particularly* exposed” to the dangers of war, they have the right to move from that area “to the same extent as the nationals of the States concerned.”⁴ Thus, if the hostile belligerent prevents its own nationals from moving, enemy civilians have no right to move. Although not free to depart the belligerent’s territory if they wish, enemy civilians can be forced to accept exactly the same extent of risks as the national populace. Furthermore, from the wording of the Convention, enemy nationals in areas not “particularly exposed” but in which there was some reasonable risk from the conflict would seem to have not even the right to “national treatment.” Thus, the hostile belligerent’s nationals in an area not so endangered as to be “particularly” exposed to risk might be quite free to move elsewhere, while, for avowed control purposes, the belligerent lawfully could require enemy civilians to remain.

The Civilian Convention does prohibit using protected persons to render points or areas immune from military operations.⁵ That duty, however, concerns moving civilians to the location of military or establishing activities that are military targets where civilians are present in an attempt to make military targets immune from attack. This is in line with the idea of not actively placing civilians, including enemy civilians, in a place “particularly exposed” to risk. In the Civilian Convention, the reference to establishing “safety zones,” which applies for enemy and non-enemy civilians and in either a belligerent’s own territory or in occupied territory, is permissive, not obligatory. Further, the provision covers categories of persons more susceptible of injury. Thus, belligerents *may* establish “hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.”⁶ As regards enemy civilians in occupied territory, the Occupying Power again has the duty of not using protected persons to render points or areas immune from military operations.⁷ However, the Civilian Convention does not appear to create an affirmative duty to relocate enemy civilians even if they are endangered greatly by the continued conflict and circumstances of the Occupying Power’s military security to make relocation feasible as long as the Occupying Power has not established military activities in close proximity of civilians.

⁴*Id.* at Art. 38(4).

⁵*Id.* at Art. 28.

⁶*Id.* at Art. 14.

⁷*Id.* at Art. 28.

Article 49, in permissive, not obligatory, language provides that the Occupying Power *may* undertake total or partial evacuation of a given area “if the security of the population or imperative military reasons so demand.” This right of the Occupying Power, rather than a duty, is set forth as an exception from a general duty *not* to engage in individual or mass forcible transfers in occupied territory.⁸ Article 49 does give enemy civilians the right to move from an area “particularly exposed to the dangers of war” by prohibiting the Occupying Power from detaining them in such areas. That right is limited, however, by authorizing the Occupying Power to detain “the enemy civilians if the “security of the population” or “imperative military reasons so demand.” As regards “security of population”, the purpose of the restrictive clause is to avoid the risk to the populace that could result if enemy civilians or other protected persons were to seek to move *en mass* with no safety controls or in conditions of immediate armed conflict.⁹ To justify prevention of movement on grounds of military reasons, the need must be imperative, such as significant hindrance to important military operations, not merely a matter of military convenience to the Occupying Power. Thus, although the Occupying Power has no general affirmative duty to relocate enemy civilians to a safer location, those civilians do have the individual right to choose to move to a safer location, albeit circumscribed by exceptions that, in situations of some civilian safety risk or military difficulty, could be applied by the Occupying Power with little expectation of successful challenge for abuse of discretion.

In summary, the development of modern military armament increasingly will subject enemy civilians in territory controlled by a hostile belligerent to much greater risks than in the past, despite the best of reasonable, good faith efforts of a hostile belligerent to place them in positions of sure safety. However, in contrast to this scenario of increasing risk, the current law of protection of enemy civilians does *not* obligate the hostile belligerent to make that effort, either in its own territory or in occupied territory. In the belligerent’s own territory, the law creates only a highly limited obligation to allow the enemy civilians to exercise individual choice to move to a safer zone.

⁸Pictet’s *Commentary* described the Occupying Power as having both the right and duty of evacuation of inhabitants to places of refuge. However, this assertion is made in the context of the inhabitants being endangered as the result of military operations. J. Pictet (ed.), *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 280 (1958) [hereinafter cited as Pictet]. This situation causes Article 28 to apply, with its duty of evacuation. Where military operations of the Occupying Power have not placed the inhabitants in danger, Article 49 expresses only a right of the Occupying Power to require evacuation.

⁹Pictet, *supra* note 8, at 283.

c. Scarcity of Resources to Support Enemy Civilians

A second adverse factor to consider in the context of the trend in modern armed conflicts is that the Civilian Convention envisions the possibility of substantial resources being committed to the maintenance of enemy civilians. In the hostile belligerent's own territory, the Convention entitles interned civilians, *inter alia*, to adequate shelter, clothing, food, and medical services.¹⁰ In occupied territory, the Occupying Power has various support duties, including, if necessary, the duties to provide adequate food and medical supplies from its own resources and to maintain adequate public hygiene and health facilities.¹¹ Significant numbers of trained military and civilian personnel specialized in various skills are required to administer support and control regimes concerning enemy civilians in territory controlled by a hostile belligerent.

The implicit model for these requirements of substantial resource commitments is that of conflict between states amply endowed with these various resources and having them available for use in areas perhaps well-removed from the combat zone. However, in a world community overwhelmingly composed of "developing" states possessing meager quantities of these resources, the reality is that the belligerents, or some of them, in most of the future armed conflicts will possess these resources at extremely low levels even at the initial stages of the conflict. This scarcity will be aggravated as resource attrition occurs during combat. Related to the problem of safe location for enemy civilians is the fact that, in many instances, suitable support facilities and personnel infrastructure may be available only in or near urban centers, which may contain vital military targets. To expect an undeveloped state in the throes of warfare to establish anything but the most primitive of internment facilities or to provide adequate resources to sustain enemy population in occupied territory when its own citizens are living in inadequate circumstances would be most illusory. As regards enemy civilians detained but not interned in a hostile belligerent's territory, Pictet tells us that, paradoxically, in World War II: "The living conditions of enemy civilians who remained at liberty... were sometimes more precarious than those of internees."¹² The Civilian Convention requires the Detaining Power to provide for support of enemy civilians who are detained but not interned if there is a nexus between their inability to support themselves and the Detaining Power's control measures. Addition-

¹⁰Civilian Convention, Arts. 85, 89-91.

¹¹*Id.* at Arts. 55, 56.

¹²Pictet, *supra* note 8, at 249.

ally, enemy civilians are entitled to national treatment concerning employment, subject to security considerations.¹³ However, establishing the grounds to cause this contingent support duty to become operative or to show violation of the national treatment standard for employment could be most difficult. Situations of extreme hardship could result. Ironically, Pictet noted that Article 42 of the Civilian Convention requires the Detaining Power to intern an enemy civilian who voluntarily requests internment and that the "voluntary" request can be based on the miserable circumstances encountered if not interned.¹⁴ Thus, confinement may be accepted to acquire adequate support.

d. Ideological Animosity and Attitudes Toward Enemy Civilians

A third adverse factor bearing upon the welfare of enemy civilians in territory controlled by a hostile belligerent is that the presence of severe ideological animosity between belligerents is one of the realities of modern international armed conflict. This animosity may result from excessively parochial nationalism or differences in political philosophy, race, religion, or ethnic background. Hostile attitudes toward enemy civilians may exist in any conflict if for no other reason than the tragic losses suffered in combat. Additionally, ideological animosity or long-standing feuds based on past instances of conflict or felt injustice may fuel the passions of the hostile belligerent's populace or military and result in excessive deprivations to enemy civilians.

e. Insufficient Training and Control of the Hostile Belligerent's Military Forces and Civilian Population

Finally, the risk of mistreatment of enemy civilians in many future conflict situations is increased by the fact that the military forces of many of the developing states are, unfortunately, not well trained and disciplined and that, in many states, there is little evidence of significant instruction of either the military forces or pertinent civilian groups in the law pertaining to the protection of enemy civilians. Further, the governments of many states today have major difficulty in maintaining adequate public safety even in peacetime. Frequently, foreign persons are the victims of hostile actions by members of the populace. In crisis conditions of armed conflict, many belligerents may simply be unable to fulfill their obligations to protect enemy civilians from deprivations by either undisciplined military personnel or by a violent populace. Defects in "personnel

¹³Civilian Convention, Art. 39.

¹⁴Pictet, *supra* note 8, at 259.

infrastructure'', combined with ideological animosity or hatred and great difficulty in maintaining public order, provide a scenario for grave risk to enemy civilians, especially to those present in the belligerent's own territory. This level of risk undoubtedly would increase as the conflict continues.

III. THE FREEDOM OF ENEMY CIVILIANS TO DEPART FROM TERRITORY CONTROLLED BY A HOSTILE BELLIGERENT

Given that the process of modern international armed conflict generally involves substantially increased risks to enemy civilians present in territory controlled by a hostile belligerent, the conclusion follows that the freedom of enemy civilians to depart that territory may in some instances be essential for their protection. In any event, perspectives of fundamental human dignity require that, in the absence of very substantial, countervailing considerations, enemy civilians should be able to exercise freedom of choice to depart from hostile belligerent control. Freedom of departure is a fundamental aspect of freedom of personality, which is at the core of concern in the humanitarian law of armed conflict. It is submitted that the Civilian Convention should clearly obligate a hostile belligerent to allow enemy civilians to depart from territory the belligerent controls as long as no *significant* detriment is suffered by that belligerent or no *significant* advantage accrues to the opposing belligerent. This view is consistent with the fundamental balancing principle which underlies the humanitarian law of armed conflict. An examination of the trends in the law in this area follows.

A. FREEDOM TO DEPART FROM THE HOSTILE BELLIGERENT'S OWN TERRITORY

As the highly authoritative Pictet's *Commentary*¹⁵ has noted, the legal status of enemy civilians present in a belligerent's territory has changed from that of slaves under Roman Law, to treatment as prisoners of war in the time of Grotius, to persons free to leave a belligerent's country under long-standing customary international law. Consequently, by the time of negotiation of the Hague Regulations of 1907,¹⁶ the draftsmen thought the inclusion of a provision forbidding the prevention of enemy civilians from leaving a belligerent's territory was clearly unnecessary. In Pictet's words: "They felt

¹⁵*Id.* at 232.

¹⁶Hague Convention No. IV of October 18, 1907 Respecting the Laws and Customs of War on Land with Annex of Regulations, 36 Stat. 2777 (1910), T.S. No. 539 [hereinafter cited as Hague Convention].

it went without saying.”¹⁷ However, the drafter may have had much more in perspective the experience of the past than the anticipation of the experience of the future. By the eve of World War I, the conception of the use in major conflicts of massive military forces based upon compulsory military service was well established. With this in mind, the practice at the onset of World War I, and even more so for World War II, was to detain and to intern large numbers of enemy civilians. Unfortunately, in that period, a widespread and indiscriminate restraint of enemy civilians occurred. Although the practices of states varied, many enemy civilians were detained and interned. From any reasonable perspective of military necessity, these detainees should have been permitted to leave the hostile belligerent’s territory. Likewise, many were interned who, at the most, should have deplorable conditions.”¹⁸ Subsequent, *ad hoc* instances of unilateral authorization to leave, or agreed exchanges, dealing with children, the aged, the sick, and women brought tardy relief for some. However, in many instances where some members of a family were authorized to depart, relatives chose to remain together in what was in effect a form of captivity, rather than separate. Unnecessary controls over the freedom of enemy civilians to leave a belligerent’s territory led directly to unnecessary physical and emotional suffering, often extreme, by them and by their loved ones.

In a preliminary “Draft Convention” prepared by the International Committee of the Red Cross (ICRC) and adopted as a draft convention by the XVth International Conference of the ICRC in Tokyo in 1934,¹⁹ the ICRC sought, *inter alia*, to establish a regime of protections for detainees and internees. Further, the Draft Convention sought to limit a state’s power to prevent enemy civilians from leaving its territory to two categories: persons who were liable to be mobilized in the military and persons whose departure “would threaten the security of the State of residence in some other way.” With the outbreak of conflict in 1939, the Draft Convention failed to enter into force and enemy nationality alone often was the basis for detainement and internment. During the war, the ICRC was able, for approximately 160,000 civilians of fifty different nationalities, to arrange that internees be given the benefit, by analogy, of the provisions of the 1929 Geneva Prisoners of War Convention.²⁰

¹⁷Pictet, *supra* note 8, at 232. See Wilson, *Treatment of Civilian Alien Enemies*, 37 Am. J. Int’l L. 32 (1943).

¹⁸Pictet, *supra* note 8, at 233.

¹⁹*Id.*

²⁰*Id.*

In 1949, the negotiators of the Civilian Convention dealt with the right of enemy civilians to leave belligerent territory in Article 35. That Article represents the present trend of decision. Article 35 states, in part: "All protected persons who may desire to leave the territory at the onset of, or during, a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State."²¹

As against the apparent recognition of the right of enemy civilians to leave a belligerent's territory, one could hardly imagine a broader right of discretion to prevent departure than the emphasized "limitation" on the right. The term, "national interests," which in today's world has received the broadest possible interpretation in many other contexts, stands totally undefined in Article 35. Pictet's *Commentary* asserted that "national interests" is broader than "security considerations," the term used in the ICRC Tokyo Draft, which the Diplomatic Conference negotiating the Civilian Convention had rejected.²² The *Commentary* noted, for example, that endangerment to the national economy would fall within the meaning of the term, since the Conference had "in mind, in particular, the case of countries of immigration, where the departure of too large a proportion of aliens might prejudice national interests by creating manpower or economic problems, etc."²³ The *Commentary* correctly, albeit in understatement, stated that "a great deal is thus left to the discretion of the belligerents, who may be inclined to interpret 'national interests' as applying to many different spheres," and exhorted states to show moderation by invoking national interests only in cases of reasons of "utmost urgency," due to "the poor conditions in which civilian aliens have all too often been detained."²⁴

The present state of international law effectively permits hostile belligerents to detain, at least for some period and possibly to detain or intern for the duration of a lengthy conflict, virtually every able-bodied enemy civilian, regardless of age or sex.

In the past, the core of state practice was to detain and intern male enemy civilians aged sixteen to sixty, the usual age range subject to military service. Quite often, children and youth below the age of sixteen, women in general and those of both sexes above the age of sixty were permitted to leave the belligerent's territory. However,

²¹Civilian Convention, Art. 35 (emphasis added).

²²Pictet, *supra* note 8, at 236.

²³*Id.* (citing 11-A Final Record of the Diplomatic Conference of Geneva of 1949 653-54, 737-38; *id.*, II-B 410.

²⁴Pictet, *supra* note 8, at 236.

under an argument of minimal economic advantage to the enemy civilians country or of minimal economic disadvantage to the belligerent in whose territory the enemy civilians are present, persons of *both* sexes from the age of twelve or thirteen to the age of seventy or beyond could justifiably be held by the hostile belligerent under the amorphous term “national interests.” With such a blanket authority to prevent departure, the requirements of Article 35 that decision on applications to leave be made “as rapidly as possible” in accordance with “regularly established procedures”, that the protected person may have a refusal of the application reconsidered “as soon as possible” by an appropriate court or administrative board designated by the Detaining Power, and that representatives of the Protecting Power, at its request, must be furnished “as expeditiously as possible” the names of persons denied permission to depart and the reasons for denial, unless security reasons prevent it or the departed person concerned protests, merely ensures in most instances the observance of procedural niceties in exercising the virtually unbridled discretion of the Detaining Power to decide whom it will detain. One would contend that surely babies, young children, the very elderly, and the seriously ill or disabled have the clear right to leave; an argument to prevent their departure on the ground of national interests would be ludicrous. However, these persons are those in greatest need of accompaniment by at least one adult, able-bodied family member and, if that were not permitted, then in the great majority of cases those persons would not leave and, in effect, be detained. Further, in cases where the enemy civilian has resided for some time in the Detaining Power’s territory, that state could argue that, at the conflict’s end, the detained persons might well choose to remain and seek the return of departed family members, potentially causing political, administrative, and economic difficulties for the Detaining Power. Therefore, the Detaining Power could argue that the “national interests” concept would support maintaining the family unit together when the principal adult members of the family are detained. Thus, the term “national interests” could render nugatory any obligation to permit enemy civilians to depart a hostile belligerent’s territory.

Manifestly, neither in 1949, nor over thirty years later in the context of modern armed conflict, does Article 35 strike anything approaching the proper balance between the principles of military necessity and of protection of enemy civilians. As Article 35 presently reads, the Detaining Power has the discretion to control enemy civilians far beyond that which military necessity justifies. One recognizes that, in situations of armed conflict in which a state allocates the overwhelming portion of its resources in support of that conflict,

virtually every able-bodied person, from the early teenager to the elderly, is in some way a potential contributor to the war effort. However, this scenario envisions a “total war” armed conflict situation. Enemy civilians present in a hostile belligerent’s territory at the outbreak of conflict normally are a mere handful in comparison to the total population of their country. Especially in the post-World War II era of “limited” warfare, it is submitted that the potential contribution to their country’s armed effort or to the economic system of the hostile belligerent if they are detained represented by this group of enemy civilians is indeed negligible. In response to the position that certain enemy civilians may be inducted into military service, it is noted that, in modern armed conflict, the sheer weight of numbers in the field is much less important than in the past. In today’s world of sophisticated military weaponry, it is technological skills and experience, especially that adaptable for military use, that is vital. Additionally, the number of potential military personnel represented by enemy civilians present in a hostile belligerent’s territory at outbreak of conflict is normally extremely small in relation to their country’s population. Thus, even as regards this “core” group of permissible detainees under past practice, it is suggested that modern armed conflict situations do not warrant an automatic blanket right of the hostile belligerent to hold these enemy civilians in its territory. Finally, it should be recalled that in their harsh restraint upon the expression of the freedom of personality, unnecessary detainment or internment are themselves highly deprivational. In the circumstances of the particular individual affected, unnecessary detainment or internment may lead to gravely serious physical and emotional suffering, even death.

On the basis of the foregoing discussion, the proper balance of military necessity and the protection of enemy civilians requires major revision of Article 35 of the Civilian Convention. First, the provision should explicitly state the unrestricted right of all enemy civilians to leave a hostile belligerent’s territory, if they choose, and then except from that blanket inclusion only the following categories of persons:²⁵ enemy civilian males from sixteen to sixty years of age, enemy civilian males of lesser or greater age and enemy civilian females, to the extent that the law of the state of their nationality renders them liable to bear arms and participate in combat operations, and any other enemy civilian possessing such skills or informa-

²⁵The focus in this discussion of Article 35 concerns only enemy civilians. The question of the appropriateness of providing for other protected persons is not addressed.

tion that the civilian's departure from the Detaining Power's territory would *manifestly* present a *significant* threat to the security of the belligerent.²⁶

As to the first two excepted categories, it is proposed that Article 35 would provide further that those persons would have the right of departure from the Detaining Power's territory to the territory of the state of their nationality if their state and all of its co-belligerents gave solemn assurance that these protected persons would not be accepted into their military services or permitted to serve in any civilian capacity with the military services and their state authorized the Detaining Power's Protecting Power, or Substitute for the Protecting Power, to determine and report that the assurances were effective. The one exception to the Detaining Power's duty to permit departure of these two categories of enemy civilians to their State of nationality and, likewise, the one exception to the blanket, unrestricted departure authorization given to the general class of enemy civilians, would be the particular instance in which the number of persons departing was so great that their addition to the opposing belligerent's economy *manifestly* would be a *significant* contribution. In that situation, enemy civilians in the number less than that manifestly constituting a significant economic contribution to the opposing belligerent would still be entitled to depart to their state of nationality, with priority to families departing as units. If the two requirements set forth for the departure of the first two excepted categories were not met, or if the exceptional situation applied, Article 35 would provide, finally, that those two categories of persons or those of the general class of enemy civilians and of these two categories who were prevented from departure to their state due to application of the exceptional situation, had the right to depart to the territory of a third State if a state party to the Civilian Convention that was a neutral in the subject conflict offered its territory as a place of internment for enemy civilians, whether actual administration of the internment regime was conducted by personnel of the neutral state or of the Protecting Power for those enemy civilians, or a Substitute for that Protecting Power, and that state, and any other state or organization participating in administration of the internment regime gave solemn assurances of the use of best efforts to retain these enemy civilians under the internment regime, to include the duty to return to the Detaining Power's control any person who attempted to breach the restrictions established.

²⁶This third category could overlap with the other two, such as in the case of a thirty-two year old male nuclear physicist.

With an eye to the “art of the possible” in any future negotiations on the revision of Article 35, this proposal to deal with the freedom of enemy civilians to depart from a hostile belligerent’s own territory is offered for governmental and scholarly consideration. Perhaps the more difficult problem concerns the freedom of enemy civilians to depart from occupied territory controlled by a hostile belligerent.

B. FREEDOM OF DEPARTURE FROM OCCUPIED TERRITORY

For one to assume that enemy civilians present in occupied territory would prefer to remain there would be incorrect. First, some of that class of protected persons might be nationals of a belligerent state allied with the state whose territory is occupied. Those enemy civilians might wish to depart to the territory of their home state or elsewhere. They are, in effect, in much the same position as enemy civilians present in the hostile belligerent’s own territory and the Civilian Convention in Article 48 incorporates Article 35 as governing their requests to depart. All of the foregoing discussion regarding the freedom of enemy civilians to depart from the hostile belligerent’s home territory applies here with perhaps even stronger criticism of the use of congruence with the hostile belligerent’s “national interests” as the standard to determine the enemy civilians’ rights of departure. The standards establishing the rights of control of the Occupying Power in occupied territory are the necessities of preserving military security and of maintaining the Occupying Power’s military occupation force and administrative officials and the duty to perform the functions of government placed upon an Occupying Power by the Civilian Convention and other conventional and customary rules of armed conflict. Whatever may be the legitimate scope of “national interests” for a belligerent to consider in restricting the right of an enemy civilian to depart from territory over which the belligerent exercises full powers of sovereignty, assuredly the scope of “national interests” that an Occupying Power may apply in considering a departure request of an enemy civilian in occupied territory must be limited by the narrower scope of authority possessed in such territory by an Occupying Power. The earlier proposals for modifying Article 35 apply even more trenchantly in this situation.

As regards the freedom of enemy civilians who are nationals of the state whose territory is occupied to depart from the occupied territory is only implicit under the Civilian Convention. Article 49 prohibits individual or mass *forcible* transfers or deportation of protected persons in occupied territory, with the proviso that evacua-

tions of a given area are permissible if the security of the population or imperative military reasons so demand. The Convention contains no provision explicitly governing the right of these persons voluntarily to depart occupied territory. Pictet stated that the focus of the drafters of the Civilian Convention was on prohibiting future forcible transfers and deportations such as those that brought death and misery to millions in World War II.²⁷ The ICRC's draft at the negotiating conference absolutely prohibited deportations or transfers of protected persons from occupied territory.²⁸ However, the Diplomatic Conference envisioned that some protected persons might voluntarily wish to depart:

The Conference had particularly in mind the case of protected persons belonging to ethnic or political minorities who might have suffered discrimination or persecution on that account and might therefore wish to leave that country. In order to make due allowances for that legitimate desire the Conference *decided to authorize voluntary transfers by implication*, and only to prohibit "forcible" transfer.²⁹

The shortcoming of this approach is that the nature of the right of enemy civilians to depart from the occupied territory of the state of their nationality is left unclear. Article 49 recognizes the freedom of enemy civilians to leave areas "particularly exposed to the dangers of war" with the limitation that the Occupying Power can prevent departure if "the security of the population" (dangers of significantly increased exposure to weaponry) or "imperative military reasons" (hindrance of vital military operations) so demand. However, departure from occupied territory altogether is not mentioned. The implicitly recognized permissibility of voluntary transfers within or outside occupied territory seems a weak expression of a right to depart occupied territory. Perhaps because these enemy civilians are already in the territory of their state of nationality, the drafters of the Civilian Convention did not think a provision explicitly recognizing the right of departure from that territory was essential. The view that very few of these enemy civilians automatically would have a right of entry into another state's territory may have caused reluctance to speak of a right of departure from one's home territory. Since the Occupying Power exercises broad powers of governance

²⁷Pictet, *supra* note 8, at 278.

²⁸See XIII International Red Cross Conference, Draft Revised or New Conventions for the Protection of War Victims, Doc. 4a, at 173, *quoted in* Pictet, *supra* note 8, at 279.

²⁹*Id.*

over enemy civilians present in occupied territory, the view was that explicitly stating a right of departure, however restricted, was inappropriate. The response to this series of conjectures is, first, that for many reasons, including past destruction and future risks of further armed conflict, enemy civilians may wish to depart at least temporarily from occupied territory. Secondly, their own government may be willing to accept them into territory it still controls, or third states may be prepared to accept varying numbers of these protected persons, at least on a temporary basis. Thirdly, although the Occupying Power exercises substantial powers of governance over enemy civilians in occupied territory, it is nevertheless a foreign state exercising the limited power of belligerent occupation, not the comprehensive, sovereign authority of the state of the enemy civilian's nationality.

Thus, it is suggested that the features of the implicit departure right of enemy civilians who are present in occupied territory and are nationals of the state whose territory is occupied are that they have the right to depart unless prevented by "the security of the population," or "imperative military reasons" of the Occupying Power. To reduce those limitations to lesser generality, it is proposed that the Occupying Power is entitled to prohibit departure from occupied territory only if the Occupying Power reasonably foresees *unavoidable*, substantially increased risks of injury to these civilians in the course of departure, due to the continuing armed conflict, or due to the hazards of a massive, rapid exodus, the departure *significantly* threatens the continued ability of the Occupying Power to have sufficient civilian manpower authorized by the Civilian Convention to support its occupation force and to perform government functions required if the Occupying Power under the Civilian Convention and other rules of international law, or the departure were to provide the opposing belligerent with a *significant* benefit in its war effort. The emphasized words are to indicate that the Occupying Power would be under the duty to take whatever reasonable actions of regulation, management, and cooperation that are available to support the right of voluntary departure and that only significant adverse effect upon the interests of the Occupying Power justifies prevention of departure. With the incorporation of these guidelines, future negotiations should add an explicit provision on right of departure for this class of enemy civilians much along the lines of that proposed for modification of Article 35. The principal restraint would be that any great number of able-bodied adult male or female enemy civilians in occupied territory probably would not be entitled to depart. Departure of a significant percentage of those persons probably would significantly reduce the authorized civilian man-

power needed by the Occupying Power. Additionally, if departure was to other territory of the state of their nationality, it would probably contribute a significant military or economic benefit to the opposing belligerent. As discussed under Article 35, ultimate emphasis would be on promoting the maximum authorized departure to neutral states willing to accept enemy civilians for internment.

IV. A FINAL PROPOSAL

The “treaty family” of the four 1949 Geneva Conventions stands as one of the few examples of a series of comprehensive international agreements in which participation is virtually universal and which deal with many complex repetitive interactions in situations of vital international concern, such as modern armed conflicts. Such agreements, however, contain no established, standing institutional agencies or arrangements for on-going research, data gathering, reporting, and recommendations for progressive development of the law under the agreements. In the past, the laudable but *ad hoc* initiatives taken have been due to the exceptional interest and drive of the ICRC or a particularly interested state. The totality of the useful institutional arrangements to promote the optimal effectiveness of the Civilian Convention or all four of the 1949 Geneva Conventions is a subject for another time. However, the need is self-evident for establishing within the Conventions, and especially the Civilian Convention, a small Secretariat and a Commission of Experts for the promotion of on-going legal research, data gathering, and preparation of proposals for consideration of the parties as regards interpretation and modification of the Conventions or enactment of parallel implementing national legislation. For the future, promotion study and consultation on proposed modifications of substantive provisions, such as those offered here, is important. However, perhaps of greater long-term significance would be efforts by the ICRC and interested parties to encourage consultation on creation of various institutional arrangements to enhance the effectiveness and progressive development of humanitarian law of armed conflict under the 1949 Geneva Conventions. If even a modicum of success in advancing those objectives resulted, those efforts would have served “the interests of humanity and the ever progressive needs of civilization.”³⁰

³⁰Hague Convention, Preamble.

BOOK REVIEWS

NEW RULES FOR VICTIMS OF ARMED CONFLICTS*

Bothe, Michael, Karl Josef Partsch, and Waldemar A. Solf. *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*. The Hague, Boston, London: Martinus Nijhoff Publishers, 1982. Pages: xxi, 746. Index. Price: \$145.00. Publisher's address: Kluwer, Boston, Inc., 190 Old Derby Street, Hingham, Massachusetts 02043.

*Reviewed by Major H. Wayne Elliott***

Perhaps no event in recent years has prompted more discussion in the area of international law and the law of war than the 1977 Protocols to the Geneva Conventions of 1949.² The Protocols, some argue, will significantly affect the ability of the U.S. military to carry out its mission. Others argue exactly the opposite — that any effect of the Protocols on U.S. military operations will be minimal and that the “humanitarian” considerations of the Protocols outweigh any slight restriction on military operations. For the lawyer,

*The opinions and conclusions presented in this book review, and in the book itself, are those of the authors and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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¹See, e.g. Gehring, *Loss of Civilian Protections Under the Fourth Geneva Convention and Protocol I*, 90 Mil. L. Rev. 49 (1980); Mallison, *The Juridical Status of Privileged Combatants under the Geneva Protocol of 1977 Concerning International Conflicts*, 42 Law & Contemp. Prob. 4 (Spring, 1978); Norsworthy, *Organization for Battle, The Judge Advocate's Responsibility Under Article 82 of Protocol I to the Geneva Convention*, 93 Mil. L. Rev. 9 (1981).

²The Protocols are reprinted in U.S. Dep't of Army, Pamphlet No. 27-1-1, *Protocols to the Geneva Conventions of 12 August 1949* (1979), and in 16 I.L.M. 1391 (Nov. 1977) [hereinafter cited as *Protocols*].

the commander, or the soldier, these are important considerations. Any potential restriction on the ability of a force to fight — and win — a war should be considered in detail. The book under review³ will significantly aid anyone who has a need to resolve questions as to the effect or intent of the Protocols.

Treaties, like many other contracts, are often the result of seemingly endless negotiations, involving diverse parties⁴ the end result of which is a compromise. Such a compromise necessarily leaves questions as to exactly what the drafters intended. To find that intent, international law, like its domestic counterpart, permits the examination of the diplomatic negotiating record.⁵ In the law of war, this tool is particularly important. The negotiations over a treaty governing the conduct of hostilities are replete with the reflection of various political arguments. To sort through the political exhortations of the drafters can be exhausting; to do less can lead to a misunderstanding of the drafters' intent. The authors of this book, delegates to the conference themselves, have provided a succinct commentary on the negotiations for each article. In doing so they render a service to those who must work with the 1977 Protocols.

The book begins by providing a short history of the events leading to the convening of the diplomatic conference. Three factors, indicative of the need for a revision of the law, were considered of special importance. First, the methods and means of waging war, have gone essentially neglected since the Hague Regulations of 1907.⁶ Secondly,

³M. Bothe, K. Partsch, & W. Solf, *New Rules for Victims of Armed Conflicts* (1982) [hereinafter cited as *Protocols*].

⁴The Protocols are the result of four drafting sessions beginning in 1974 and ending in 1977. Each session had delegations from over one hundred countries.

⁵Article 32 of the Treaty on Treaties entitled "Supplementary Means of Interpretation" provides:

Supplementary Means of Interpretation

Recourse may be had to be supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Article 31 provides the general rule of interpretation, essentially one of "good faith" and ordinary meaning, Vienna Convention on the Law of Treaties, 8 I.L.M. 679 (1969).

⁶36 Stat. 2277, T.S. No. 539 (1910).

even though the 1949 Geneva Conventions⁷ added many legal protections for the civilian population, warfare since 1949 has increasingly affected the civilian population. Thirdly, warfare since 1949 has tended to be a different type of conflict than the "traditional" World War II type. Warfare in recent years has been characterized by insurgent forces and guerilla tactics. In short, the old rules simply did not fit such new types of conflicts. That the nature of conflicts had changed was recognized by the delegates. However, the exact extent and type of new rules to be applied to such conflicts caused considerable difficulty. Thus the first few pages of the book provide an introduction to the problem. This portion of the book outlines the difficulties inherent in organizing a conference to deal with so important an issue as war. An initial question for the conference was exactly what type of conflict should be covered. There was a fear that a treaty which attempted to rewrite the 1949 Conventions might actually reduce the scope of those protections.⁸ Essentially, there was a determination that the end product of the negotiations not be biased politically; the result had to be one on which the various political entities and systems could agree. For the person with a question concerning the history and spirit of the Protocol negotiations, the introduction to the book is an excellent research tool. The introduction provides the framework in which the negotiations took place, and equally important, the spirit, goals, and intent of the conferees.

The book then proceeds to an article by article analysis. Two will be considered here. Article I is entitled "General Principles and Scope of Application." The article has been the subject of some discussion⁹ because it purports, in Paragraph 4, to extend the protections of the full law of war to "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." Obviously, the language has political overtones, yet it purports to establish a regime of law. The authors put aside the

⁷Geneva Convention for the Protection of War Victims (Armed Forces in the Field), Aug. 12, 1949, 3 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Conventions for the Protection of War Victims (Armed Forces at Sea), Aug. 12, 1949, 3 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention for the Protection of War Victims (Prisoners of War), Aug. 12, 1949, 3 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention for Protection of War Victims (Civilians Persons), Aug. 12, 1949, 3 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287.

⁸Bothe, *supra* note 3, at 10.

⁹See, e.g., DePrue, *Amended First Article to the First Draft Protocol Additional to the Geneva Conventions of 1949—Its Impact Upon Humanitarian Constraints in Governing Armed Conflict*, 75 Mil. L. Rev. 71 (1977).

political rhetoric and rely instead on the legal argument. For instance, the concept of "armed conflict" is defined by the authors essentially as a conflict which exceeds riot, sporadic acts of violence, and similar actions normally considered criminal. Further, the conflict must be such that it requires the use of the armed forces rather than the police to put down the uprising. In defining "racist regimes," the authors conclude that the key point is "the absence of the participation of the entire population—for reasons of race and color—in the political process."¹⁰ The key to the definition is, therefore, the structure of a state's election laws. "Alien occupation," is intended to apply only in cases wherein a "High Contracting Party" occupies a portion of a non-High Contracting party, or in "territories with a controversial international status."¹¹ The population of the occupied territory must also be fighting for "self-determination." The authors conclude that the language of Paragraph 4, Article I, was chosen with two actual conflicts in mind—South Africa and Palestine.¹² Given that limited field of application, perhaps this paragraph is actually less radical than many assume.

Of particular importance to the military lawyer is Article 82,¹³ "Legal Advisors in Armed Forces." This idea, new to the law of war, was first introduced by the Red Cross Experts' Conference in 1971. The Red Cross provision would have established the place of the lawyer in the military hierarchy and would have explained in detail their "supervisory functions regarding military instructions and breaches of international law."¹⁴ Opposition to this proposal came mainly from Brazil which argued that it was too ambitious for many states. Several states stressed that "legal advisors should assist and not control."¹⁵ Article 82 is, therefore, a compromise. First, only High Contracting Parties are obligated to have legal advisors "at all times." Thus insurgent or rebel movements are considered other "Parties to the conflict," and need have legal advisors only after the

¹⁰Bothe, *supra* note 3 at 50.

¹¹*Id.* at 52.

¹²*Id.*

¹³Protocols, Article 82—Legal advisers in armed forces.

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

¹⁴Bothe, *supra* note 3, at 499.

¹⁵*Id.* at 500.

“armed conflict” begins.¹⁶ Secondly, the requirement is only that legal advisors be available “when necessary.” Under the Red Cross draft these legal advisors must have been “qualified”; this requirement has been deleted. The fact that the military commander is distinguished from the legal advisor should insure that “the function of the latter cannot be taken over by military vice-commanders without any professional qualifications.”¹⁷ The authors correctly point out that the article raises a number of problems. One problem is the appropriate level for the legal advisor. Should the legal advisor be at brigade, division, corps, or at lower levels such as battalion and company? Secondly, if the commander fails to follow the advice of the legal advisor, who is responsible? If the legal advisor gives erroneous advice, who is responsible? Though the questions are raised, there are no answers. The discussion of Article 82, at least, provides some background concerning this new requirement in the law of war.

Protocol II deals with “non-international conflicts.” Having decided that the protections of Protocol I would apply in anti-colonial wars of national liberation, the delegates provided in Protocol II a lesser degree of protection for those involved in other non-international conflicts. One reason for this lessening of the protection was a belief that placing too high a standard on the parties to such conflicts might indirectly aid the rebel movements, while, at the same time, impairing the ability of many newly independent regimes to comply with the law. The conference was divided among those nations which believed that there should be a simple unified protocol for both types of conflicts and those who believed that a separate protocol was necessary for non-international conflicts. A smaller group believed that Protocol II was absolutely necessary. The result is a Protocol with a threshold of application above that of Common Article 3, the non-international conflict article, of the 1949 Geneva Convention.¹⁸ The provisions of Protocol II “develop and

¹⁶The phrase “armed conflict” is presumably interpreted just as in Article 1. *Id.* at 10.

¹⁷*Id.* at 500.

¹⁸Article 3, the “Convention in Minature” provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any

supplement” Common Article 3. Yet, Protocol II does have a narrower field of application than Article 3. To trigger Protocol II, the dissident force must “exercise control” over a part of the territory in such a way as to “carry out sustained and concerted military operations.”¹⁹ Whether or not a dissident group triggers Protocol II is to be determined by objective criteria. The *de jure* government cannot decide that the Protocol is not triggered. To reach this compromise required much debate. The authors succinctly give the elements of that debate and the reasoning of the various parties to the debate. As the nature of war becomes increasingly non-international, one would do well to be aware of the controversy surrounding the regulations of such conflicts.

The law of war is an increasingly important area of the law. No longer will judge advocates be able to relegate it to the “extra duty”

other similar criteria.

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

- (2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties of the conflict.

The parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

¹⁸Article 1 of Protocol II is entitled “Material Field of Application.” It provides:

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

that it once was. The DOD Law of War Program²⁰ mandates familiarization by all members of the Defense Department with the law of war. The Protocols are a part of the evolving law of war. Ratification by the United States of the Protocols, with or without reservations, will impact upon the military and particularly upon the military lawyer. This book will be a significant aid in appreciating and understanding that impact.

²⁰DOD Dir. 5100.77 (July 10, 1979).

MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE*

Schleuter, David A., *Military Criminal Justice: Practice and Procedure*. Charlottesville, Virginia: The Michie Company, 1982. Pages: xx, 796. Index, Appendices, Table of Cases. Publisher's Address: The Michie Company, 1 Town Hall Square, Charlottesville, Virginia 22901.

*Reviewed by Timothy J. Grendell***

Military Justice is that system of courts providing protection to the total society from violators of rudimentary principles necessary for that society to live in peace.'

"Military justice" has been derogatorily compared to military music² and highly praised because "[Its] accuracy in coming to the 'correct' result. . .[is] far better. . .than any civilian court."³ This interesting divergence of opinions is the result of either political viewpoint or a lack of knowledge about the military justice system. While one book usually will not change a person's political outlook, David Schlueter's *Military Criminal Justice: Practice and Procedure* provides valuable insight into military criminal practice and enables the uninitiated to formulate an informed opinion about "justice" in the military.

Unlike most legal topics, few texts have been written on the military criminal justice system, a system that affects more individuals than the laws of eighteen states.⁴ Beginning with Lieutenant Colonel

'Fletcher, *Military Justice Tomorrow*, The Army Lawyer, May 1978, at 13. The author was, at the time, Chief Judge of the U.S. Court of Military Appeals, where he now serves as an Associate Judge.

²R. Sherrill, *Military Justice is to Justice as Military Music is to Music* (1969).

³Persons, *Military Justice: No Laughing Matter*. Texas B.J. 297 (April 1979)(quoting F. Lee Bailey).

*The opinions and conclusions presented in this book review, and in the book itself, are those of the authors and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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⁴See Cook, *Courts-Martial: The Third System in American Criminal Law*, 1978 S. Ill. L.J. 1.

William Winthrop's *Military Law and Precedent*,⁵ which was published more than six decades ago, less than two dozen books have concentrated on American military justice. Colonel Winthrop's treatise and *Military Justice in the Armed Forces of the United States*,⁶ published in 1952 by Robinson Everett, the current Chief Judge of the Court of Military Appeals,⁷ were the standard tomes on this topic until the Uniform Code of Military Justice (UCMJ)⁸ was amended in 1968.

Homer Moyer's *Justice and the Military*,⁹ Edward Byrne's *Military Law*,¹⁰ and *The Military in American Society*¹¹ by Donald Zillman, Albert Blaustein, Edward Sherman, and six others replaced Colonel Winthrop's and Chief Judge Everett's works as the primary volumes on military criminal law during the 1970s. Unfortunately, Moyer's crimson, binder-bound text is out of print and military justice has changed dramatically since Zillman, *et. al.*, published their book in 1978.¹² Only Byrne's broad treatment of this subject, which was republished in 1981, remains a current treatise on military justice. That is, until Schlueter's extremely informative and useful book was published in 1982.

Military Criminal Justice: Practice and Procedure is a timely, well-organized, and comprehensive text on the current United States military justice system. From the elements of military offenses to appellate review, this book discusses the requisite substantive and procedural rules governing military courts-martial in clear and understandable terms. Military acronyms¹³ are fully explained, case law with complete citations is provided, and the extensive table of contents and index facilitate the book's use as a research tool. Numerous appendices provide examples of the forms and procedural guides used in military criminal practice. The author's superb organization of the subject matter according to the

⁵W. Winthrop, *Military Law and Precedents* (1920 Reprint).

⁶R. Everett, *Military Justice and the Armed Forces of the United States* (1956).

⁷The Court of Military Appeals is the highest military appellate court. Located in Washington, D. C., the court is composed of three civilian judges appointed by the President for fifteen-year terms. Art. 67(a)(1), Uniform Code of Military Justice, 10 U.S.C. § 867(a)(1) (1976).

⁸10 U.S.C. §§ 801-940 (1976).

⁹H. Moyer, *Justice and the Military* (1972).

¹⁰E. Byrne, *Military Law* (3d ed. 1981).

¹¹D. Zillman, A. Blaustein, & E. Sherman, *The Military in American Society* (1978).

¹²For example, the adoption of the new Military Rules of Evidence in 1980 substantially altered the evidentiary rules applied at courts-martial. *See Manual for Courts-Martial, United States* (1969 Rev. ed.), ch. XXVII.

¹³In the military, every letter has a word and every word has a letter.

chronological development of a punitive military action makes this text an ideal primer for attorneys, both military and civilian, who are seeking to enter the unique practice of military criminal justice. It can also be used as a basic text for the initial study of military criminal law.

The strength of Schlueter's book is its organization and comprehensive case citation. Each chapter concludes with an index to the pertinent appendices, which is particularly valuable to practitioners since the textual explanation of the law can be readily related to the requisite form or procedure to implement the law. The text also contains a plethora of case citations which expedites the researching of specific legal issues. As such, this book serves as a handy index to the military law reporters.

Civilian practitioners will find the author's discussion of military crimes (Chapter 2) to be quite useful in preparing for trial. In particular, the author outlines the defenses to particular military offenses with footnote citations to the leading cases for each defense. Since success in the courtroom is a condition precedent to a viable military criminal practice, civilian counsel should greatly benefit from this portion of the book. Practitioners should also benefit from the pending supplement which will update the case law and contains some expanded case discussion.

The book's shortcomings are few and, for the most part, inconsequential. First, its length has been unduly extended by the repetition of many of the same books and periodicals in the "Annotated Bibliography" which follows each chapter. Although these authorities are important, one bibliography is sufficient. Secondly, the book would benefit by the inclusion of a brief overview of the American military structure and organization. Knowledge of the society being governed is a prerequisite to an understanding of the justice system controlling that society. The military is no exception. Despite the author's comprehensive glossary and the table of abbreviations, a person with no military background may experience some difficulty in understanding the role of the various levels of command involved in the military justice process. For example, the title "captain" refers to a company grade officer in the Army and a field grade commander in the Navy. Their legal powers are significantly different. Zillman, Blaustein, and Sherman¹⁴ resolved this problem by including a short introduction to the military organization at the beginning of their text.

¹⁴See D. Zillman, A. Blaustein, & E. Sherman, *supra* note 11.

The book's final limitation concerns its treatment of military case law. Like most hornbooks, this book provides a useful review of its topic — the UCMJ, the Manual for Courts-Martial (MCM),¹⁵ and relevant judicial decisions. The author's discussion of the latter, however, is somewhat limited to statements of the law from these cases. As a result, recourse to the military reporters is required. This additional research requirement appears to be one of the author's objectives. Obviously anticipating the possible misuse of the book by imprudent counsel, the author notes in his preface:

This book is not intended to serve as a substitute for careful examination of the pertinent case law, statutes, and regulations. Rather, it should complement those resources and assist the reader in understanding military criminal justice practice and procedures.¹⁶

The book complements the major resources in this area. However, the expanded discussion of the facts and holdings in selected major opinions, such as *O'Callahan v. Parker*,¹⁷ would be helpful to the uninformed reader and would increase its value as a classroom text.

As there is only one other recent book on military justice, Byrne's *Military Law*,¹⁸ a brief comparison is unavoidable. It is no insult to Byrne's excellent book to say that *Military Criminal Justice: Practice and Procedure* is a more complete and better text on military criminal law. Schlueter, a former criminal law instructor at The Army Judge Advocate General's School, is an expert at summarizing the law in an understandable fashion. The chapters flow like a well-prepared lecture and, as previously noted, contain extensive case citations. Additionally, Schlueter's text concerns *only* military criminal justice. Byrne's book is informative, but its organization is staccato. Byrne's citation of case law is not as extensive, and he included two brief chapters on administrative boards and line of duty misconduct determinations, which provide little more than an introduction to these important areas of military administrative law. From the perspective of both a new or an experienced practitioner, Schlueter's text is unquestionably more useful.

Finally, a book must be judged in light of the author's intended purpose for writing it:

¹⁵The Manual for Courts-Martial contains the specific procedures for courts-martial cases and implements the UCMJ.

¹⁶D. Schlueter, *Military Criminal Justice: Practice and Procedures*, at v. (1982).

¹⁷395 U.S. 258 (1969).

¹⁸See Byrne, *supra* note 10.

Although this book is primarily designed to serve as a guide for attorneys — civilian or military — whose practice includes military criminal justice, those studying the system or its components will find it a useful reference tool. Its contents and format are intended to lead the reader, in hornbook fashion, through the maze of procedural and substantive rules, military acronyms and related disciplinary practices unique to military criminal law.¹⁹

Military Criminal Justice: Practice and Procedure achieves this purpose and more. It is a hornbook for the uninformed civilian or service member, an instructive handbook for the inexperienced practitioner, and a comprehensive reference guide for the experienced one. It is a welcome addition to the existing limited library on military justice and a valuable contribution to the public debate over the constitutionality and propriety of the American military criminal justice system.

¹⁹Schlueter, *supra* note 16, at v.

FEMALE SOLDIERS—COMBATANTS OR NONCOMBATANTS?*

Goldman, Nancy Loring (ed.), *Female Soldiers—Combatants or Noncombatants?* Westport, Connecticut: Greenwood Press, 1982. Pages: xix, 307. Bibliographical Essay, Index, About the Contributors. Publisher's Address: Greenwood Press, 88 Post Road West, Westport, Connecticut 06881.

*Reviewed by Captain Pamela E. Kirby***

The issue of women in combat has prompted many written studies and commentaries, both within government circles and in civilian publications. During the past decade, several Department of Defense panels have been established to review the effectiveness of women in the military in general and in combat roles in particular. The results of the studies conducted within the military itself have not always been conclusive. In a recent publication entitled *Female Soldiers—Combatants or Noncombatants, Historical and Contemporary Perspectives*, editor Nancy Loring Goldman has collected a number of essays and lectures that attempt to examine this issue through a multinational and historical cross-section of case studies involving the use of women in the military. The book gives a broad sampling of women's military experience in industrialized and developing nations and seeks to shed light on contemporary arguments on this issue through a comparative analysis of documented cases worldwide. *Female Soldiers* is the result of an international symposium on the role of women in the armed forces, sponsored by the Inter-University Seminar on Armed Forces and Society, held at the University of Chicago in October 1980.

*The opinions and conclusions expressed in this book review, and in the book itself, are those of the authors and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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THE END

I. ABOUT THE AUTHORS

The editor, Nancy Loring Goldman, is a Research Associate at the University of Chicago, coeditor of *The Social Psychology of Military Services* (Sage 1976), and has completed a three-year study of women in combat. She co-authored the first article in this book on the use of women in combat in Great Britain during the two World Wars. Fourteen other authors contributed studies to this text, including a history lecturer at the University of Science and Technology in Algiers, a Department of Defense research analyst, an Air Force consultant who had participated in a three-year research project on women in combat, a retired infantry officer who is now a manpower analyst, and the Research Director at the National Board of Psychological Defense Planning in Stockholm. Unfortunately, no contributions were included from women who had served on active duty either in the past or more recently.

11. ORGANIZATION AND PURPOSE

The book is divided into three parts: The Experience of War, The Threat of War, and American Dilemmas and Options. The last section includes three essays. The first is concerned with the history of American women in the armed forces; the last two set out the arguments for and against the use of women in combat. Parts I and II of the book examine, through statistical and historical analysis, the combat performance of women in Europe, Africa, and Asian countries.

The text contains a Foreward by Morris Janowitz, the Chairman of the Inter-University Seminar on Armed Forces and Society, and an Introduction by the editor that explains the approach and the goals of the studies presented. Each essay is followed by footnotes that provide reference to an interesting and varied collection of materials. A bibliographical essay at the end of the book guides the serious researcher to additional historical and sociological sources for each country examined.

In her introduction, the editor notes two predominant themes: the process of institutionalization, which states that military institutions that make use of women must necessarily be more complex in their organization, and the cultural norms and values reflected in religious, ethical, and political goals. She remarks that the concept of totalitarianism, as reflected in a comparison of Britain with Nazi Germany and Stalinist Russia, is of little use in studying the use of women in war. Based on the lack of discernible trends among nations, Ms. Goldman does not promise that her book will success-

fully predict the success of women as war combatants. Rather, her goals appear to be to determine the effect of social change and the demands of war on women's civil and military duties. Conversely, many of the essays presented attempt to analyze the effect of women's expanded military role on their social and economic position in society as a whole. Finally, the editor attempts through the use of the case study method to provide verifiable historical data on the abilities of women in combat.

111. SUMMARY OF CONTENTS

The essays contained in *Female Soldiers* distinguish between the two senses of "women in combat": those who perform combat support tasks usually in the fields of health, communication, administration, and supply, and those serving as combat personnel in military assault units whether ground, air, or naval. More than one author points out the difficulties with this distinction when speaking of modern warfare. Assuming conditions of conventional hostilities, today's complex weapons and logistical systems blur the line between combat support and actual combat involvement. However, since the majority of the essay presented an historical overview, the distinction remained valid for the purposes of the comparative approach used.

A failing of the work was the lack of a cohesive summary of the facts and trends noted in the individual essays. Although Ms. Goldman drew a few conclusions in her introduction from the varied material within the text, any in-depth comparative study between the cross-section of national experiences presented was left entirely to the reader to accomplish. Therefore, in order to summarize fourteen diverse essays, the following table has been prepared in order to condense the major points of each:

Part I: The Experience of War

<i>Title</i>	<i>Author</i>	<i>Use of Women as Combatants</i>
1. Great Britain and the World War	Nancy L. Goldman and Richard Sites	Shift from purely nursing functions to combat-support tasks during WWI. Conscription during WWII due to critical manpower shortages, but were segregated and severely restricted to non-combat roles. Not allowed

to fire weapons. Pay unequal with men. Today have permanent Women's Army, Air Force, and Navy Corps that retain administrative autonomy although women assigned in all-male units. Current controversy: should women receive weapons training?

2. Germany and the World Wars Jeff M. Tuten

Traditionally ultra-conservative in use of women in military. Only in 1975 was the first woman accepted into the Bundeswehr with full military status. Women served under Nazi's as auxiliaries only. Current FRG constitution bans women from rendering service involving the use of arms. No militarization of nursing services. Contrast to East Germany which uses women in Army and gives them rigorous basic training and weaponry.

3. Yugoslavia: War of Resistance Barbara Janear

Strong partisan role in WWII (prior to formation of national army) inspired by Communist appeal to patriotism and political liberation. In army, women given typical combat support duties. Today receive paramilitary training in school to include weaponry. Voluntary enlistment in professional military services but no combat training or

**4. Russia:
Revolution
and War**

Anne Elliot
Griesse and
Richard Stites

duty.

Radical revolutionary tradition endorsed full equality of sexes and invited women to defend motherland. Given weapons during WWI and even formed women's battalions. Mobilization again in WWII and used as mortarwomen, snipers, and heavy machine gunners. Formed three all-female combat aviation regiments. Today, role is restricted to specific combat-support jobs. Conclusion: women called upon as combatants only in dire national emergency. In peacetime, however, combat experience does not guarantee greater social equality.

**5. Vietnam: War
of Insurgency**

William J. Duiker

Tradition of women warriors in Vietnamese history. Ho Chi Minh actively recruited women for the "people's war". Served in militia and in transport units during war with France. Used heavily for stratagems and sabotage. In war with U.S., women given burden of local civil defense and mobilized for paramilitary functions. No evidence of all-out participation in combat at the front.

**6. Algeria: Anti-
colonial War**

Djamila Amrane

Mobilization of women in war to gain colonial inde-

pendence from France. Used in support role only since no lack of fighting men. Image of armed Algerian female combatant primarily a myth, but active in sabotage and espionage.

7. Israel: The Longest War	Anna R. Bloom	Traditional Judaism provides equality of sexes but not of function; separate but equal. In 1941 , England conscripted women into the army under British command. In 1949-50 , women participated in battle as fighters and commanders. Current law conscripts women 18 and over for 24 month period, exempting married women and mothers. Combat jobs are closed to women.
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Part II: The Threat of War

8. Greece: Reluctant Presence	James Brown and Constantina Safilios-Rothschild	In wars of resistance against Turks and then Germans, women used as underground guerrilla fighters. Trained as officers in Communist revolutionary army during 1944-49 civil war. (No official military status in Greek national.) Today, 1977 law provides for conscription of women in both war and peacetime. No combat jobs. Little opportunity for commissioned status.
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9. Japan: Cautious	Karl L. Wiegand	Before 1967 , no women
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Utilization

trained in any military functions. Post-WWII constitution provided for no discrimination based on sex. Critical manpower shortage and Japan's desire to be viewed as progressive nation brought women into services. Weapons training for familiarization only; no intent to use women in combat. Current plan to increase number of women in armed forces.

10. Denmark: The Small NATO Nation Henning Sorensen

No use of women in WWII in organized forces, but active in resistance. First enlisted in regular services in 1972. By law, cannot be assigned to combat units. Home Guard Association, an auxiliary organization, provides reserves to regular forces. No current manpower shortage. Recent suggestion of the Secretary of Defense to open certain combat units to women and increase recruitment rejected by Defense Command.

11. Sweden: The Neutral Nation Kurt Torngvist

No involvement by Sweden in war since 1813. But influence of a "world at war" and other Western countries has prompted attitude that women should have expanded role in military. Began in 1960's with unpopularity of military creating

recruitment shortfalls. In **1982**, all officers' positions were opened to women.

Part III: American Dilemmas and Options

Part III of *Female Soldiers* examines the American view of the use of women in combat. In the first essay, George Quester defines the problem in this way: "Perhaps the most serious problem for women in combat will, in the end, be less what they can do and more what their fellow soldiers think they can do." The point he makes is that combat situations require the mutual confidence of the soldiers within a unit. If that confidence is lacking, the respective ability of the individual soldier becomes irrelevant.

The author notes that, as of 1980, the United States led the world in terms of percentage of female participation in the military. It was noted that although, unlike their American counterparts, Israeli women are drafted, exemptions in Israel are easily available for women, decreasing the degree of female participation in active units. From an historical standpoint, Mr. Quester discusses the use of the Women's Army Auxiliary Corps during World War II, noting that Congress took pride in demanding and legislating assurances to the American public that women would not be used in combat. The author argues that sparing females from all exposure to combat during World War II was a luxury Americans could afford since the economy was forced to mobilize to a lesser extent than in Britain or Russia.

Two isolated uses of American women in combat-related roles deserve mention: the formation of an anti-aircraft artillery unit deployed to shield Washington, D.C., from air attack and integrated with women on a trial basis in **1942**; and the formation of the Women Air Force Service Pilots (WASPs) used to ferry aircraft from the United States to combat zones. This latter group was disbanded when attempts were made to make it a regular force and an ample supply of male pilots was available.

In **1948**, Congress established the female branches of the military services on a regular basis, having seen a high point of **265,000** women in the armed forces in **1945**. Unlike legislation for the Navy and Air Force, Congress included no explicit prohibition against the Army's use of women in combat although Army regulations have interpreted congressional intent to include this prohibition. During the 1970s, Congress avoided the combat issue while the services saw a continual increase in the number of women in service. Although Congress has dismissed compulsory conscription for women, the

threat of Soviet expansion, combined with the declining birthrate of the 1950s, pointed toward maintaining a significant percentage of women on active duty.

The two final essays of *Female Soldiers* look at the arguments for and against the training and use of female combatants in today's armed forces. In his stand against such use, Jeff Tuten makes three primary arguments. First, Mr. Tuten argues that women should not be included in combat units due to their lesser physical capabilities. Since the organization of the military and its manpower requirements are dictated by the need to win, a physically inferior force will be a tactical disadvantage. Secondly, he submits that there should be no full integration of women unless it can be shown beforehand that their presence will not degrade unit cohesion and male "bonding". Furthermore, women should not even be assigned to all-female units since their lack of aggressive male traits would degrade their combat performance. Finally, since the primary function of our armed forces is to defend our society, not change it, the premise is posited that the services should not be used as a testing ground for social experimentation.

In spite of these arguments, the author recognizes that the modern concept of total war would require mobilization of all industry and labor in support of that warfare, a phenomenon unique to the twentieth century. The respective size of a state's total manpower pool, to include its women, and the productivity of that pool will be major determinant in the outcome of war.

The counterarguments set forth by Mady Wechsler Segal in her essay in support of female combatants are based on the notion that the distinction between the combat-support jobs women now hold from the jobs from which women are excluded is not the degree of risk from being killed, as the American public would believe, but rather the degree to which the jobs involve offensive or active defensive combat potential. Women are excluded from only certain types of combat, specifically, operating offensive, line-of-sight weapons.

The author argues on behalf of physical and physiological screening by job and ability, not gender. She notes that there is no current evidence that women have fewer aggressive traits than men and would, therefore, perform worse under stress. Nor, she claims, is there evidence that women interfere with so-called male "bonding". Realistically, she remarks that moral issues are hiding behind alleged statements of practicality and concern for military efficiency. Since the American public feels that women should be protected from combat, regardless of their ability, these social values

may be more important than issues of military efficiency in determining attitudes of policymakers. Yet, during times of perceived national emergency, the public may be more likely to favor sacrifices on the part of both men and women. The greater the threat, the more in favor the public will be of compulsory service for both sexes and the voluntary assignment of women to combat jobs. The author concludes that, even if the short-range decision is to continue to exclude women from combat jobs, the trend of social change and the potential impact of a total war make these policies untenable in the long run.

IV. RELEVANCE TO THE STUDY OF THE HISTORY OF WAR

Female Soldiers succeeds in underscoring the significant international trend toward increased use of women in the military. Although the majority of nations examined in this text still limit women to combat-support roles, the emphasis appears to be on expanding those roles with at least some familiarization in a training environment with weapons, tactics, and combat problems. Mr. Janowitz, in his foreword to the book, noted that where, in the past, the expansion of women's military role came about more as a result of the immediate pressure of military circumstances, today deliberate decisions by policymakers are required. Industrial nations have not yet made these decisions and the issue has not emerged in most developing nations. The fear ought to be that, without a deliberate policy in this area, women in combat-support roles will risk exposure to attack without proper training and equipment.

To further complicate the decision-making process on the utilization of women in the military, the services themselves have failed to define what combat actually is in order to exclude women from it. In his essay against the use of female combatants, Mr. Tuten noted that, in earlier centuries when weaponry was simple and its reach measured in terms of tens or hundreds of yards, the definition of combat was easier to determine. A combatant was one whose duty was defined in terms of action, location, and risk of danger. Specifically, a combatant is one whose duty involves direct action designed to kill or capture the enemy. Mr. Tuten points out that, because almost all members of the field forces have primary or secondary combatant functions and because of the unlimited reach of modern-day weapons, a female combat exclusion policy could equate with a military exclusion policy, as unrealistic as that might be.

Relating these conclusions reached by the contributing authors in *Female Soldiers* to our study of the history of war, it is evident that

the three factors influencing warfare, the social-political climate, the technology available, and the organization of the armed forces, have also determined the extent to which women have played a part in wars throughout history. Where the socio-political values of a nation viewed women in a strictly matriarchal, subservient role, as in Germany during the Third Reich or in Japan until the twentieth century, the use of women in conflicts was limited to civil and partisan activity. Similarly, as long as technology remained simplistic in terms of the weapons and modes of transportation used, the examples of women involved in close combat were the exception rather than the rule. The concept of patriarchal protection of the weaker sex still plays a role today and women in many societies have not had the opportunity to receive the kind of technical and professional training required to participate in a war of highly sophisticated weaponry.

Finally, the abilities of women as a gender and their interaction with men in a combat environment directly impact the third factor influencing warfare, that of organization. In order to win at war, a nation must be able to put together the manpower and the technology in the most effective combination possible. Most military commentators are not convinced that such a combination would include women in the front lines.

Turning to a second approach used in the study of the history of war, an analysis of how the type of war fought affected the role women played in each could be conducted. It appears that those wars involving defense of one's homeland or conflicts over ideology prompted greater voluntary participation by women. On the other hand, strictly territorial wars not presenting an immediate threat to a nation's survival were less likely to involve extensive female combat or combat-support roles. Except in the case studies of Communist revolutionary movements, rarely were women included as members of a regular armed force in the grand strategy of a nation at war.

V. CRITICAL EVALUATION

Female Soldiers — Combatants or Noncombatants is an impressive collection of historical data. The quality of the individual essays vary considerably, however, and the reader's interest is not always maintained. Internal inconsistencies appear from time to time between the various essays that undercut the validity of the arguments presented. For example, Kurt Tornquist's essay on Sweden makes the statement: "until the emancipation of women in the 20th century, women in Sweden, as in the rest of the world, rarely made any contribution to war and military defense." This remark flies in the

face of the numerous documentaries referred to in other essays contained in the book, demonstrating women's active role in the defense of their country throughout history. Certain essays lack substantial research data to support the conclusions drawn by the authors, relying instead on personal observations, interviews, and impressions.

Although this book would not be recommended for light reading, it does serve as an excellent source for further research into the history and experience of women as combatants. The main failure of the text, as mentioned earlier, is its lack of a concluding summary and a comparative study of the essays presented. Various significant historical trends could be gleaned from this material. It is a shame the editor did not attempt to do so.